No. 6148

FILED
MAY 21 1957
JOHN T. FEY, Clerk

No. 5106

United States Court of Appeals
For the First Circuit

WHIT MASON,

PLAINTIFF, APPELLANT,

v.

THE AMERICAN EMERY
WHEEL WORKS,

DEFENDANT, APPELLEE.

RECORD APPENDIX
TO
BRIEF FOR THE APPELLANT

INDEX.

		Page
Docket Entries		1
Complaint		4
Answer		6
Transcript of Evidence:		
Testimony of:		
Whit Mason,	Direct	9
Frank J. Darby,	Cross	36
Robert Morton,	Direct	81
Charles W. Parsons,	Direct	97
Deposition of T. Edward Dossett, Jr.,		100
	Direct	101
	Cross	109
	Redirect	125
	Re-Cross	127
Opinion of Hon. Edward Day, Granting Defendant's Motion for a Directed Verdict at the Conclusion of Plaintiff's Testimony		127

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

Civil Action No. 1804

Whit Mason

v.

The American Emery Wheel Works

DOCKET ENTRIES

1955

Feb. 10 Complaint filed together with appearance of M. Louis Abedon, Esq. for Pltff.
Summons issued returnable within 20 days after service.

11 Summons returned duly served and filed.

Mar. 1 Appearance of Francis V. Reynolds, Esq. for Deft. filed. Answer filed.

Apr. 15 Appearance of Owen P. Reid, Esq. as Associate Counsel for Deft. filed.

18 Continued to next term.

19 Case called and passed.

Oct. 17 Continued to next term.

18 Case called and marked ready.

21 Pltff's Request for Admissions Under Rule 36 filed. Pltff's Motion for Production of Documents Under Rule 34 filed.

27 Deft's Objections to Motion Under Rule 34 for Production of Documents, etc. filed.
Deft's Interrogatories Under Rule 33, etc. filed.

Nov. 7 Case called for hearing and M. Louis Abedon, Esq. presents Mr. Durkin of New Jersey Bar who argues Pltff's Motion for Production.
Francis V. Reynolds, Esq. in opposition. Motion granted. Mr. Durkin requests permission to withdraw Pltff's Request for Admissions. Court al-

1955

lows withdrawal. Appearance of Thomas E. Durkin, Jr., Esq. for Pltff. filed.

1956

Apr. 10 Pltff's Notice of Taking Deposition filed.

16 Continued to next term.

17 Case called and marked ready.

May 1 Deposition of Dr. Gustavus A. Bynum filed.

22 Case proceeds to trial. M. Louis Abedon, Esq. and Thomas Durkin, Esq. of New Jersey Bar, for Pltff. Francis V. Reynolds, Esq. and Owen P. Reid, Esq. for Deft.

Jury impanelled and case continued to Friday, May 25, 1956 at 10:00 A.M.

25 Trial continues. Mr. Durkin outlines Pltff's case to jury. 1 Pltff's Witness sworn.

28 Trial continues. 3 Pltff's Witnesses sworn.

29 Deposition of Dr. Charles L. Neil filed. Trial continues. 3 Pltff's Witnesses sworn. 3 Pltff's Exhibits introduced. 2 Deft's Exhibits introduced. Mr. Durkin and Mr. Reynolds read to jury the deposition of Dr. Gustavus A. Bynum.

31 Trial continues. 1 Pltff's Witness sworn. 1 Pltff's Exhibit introduced. Mr. Durkin reads to jury the deposition of T. E. Dosset. Mr. Reynolds files original of above deposition together with Notice of Deposition.

June 1 Trial continues. Mr. Durkin—Pltff. Rests. He requests that all exhibits filed by the Pltff. remain in their present status.

Mr. Reynolds for Deft. argues Motion to Dismiss. Mr. Durkin in response to Deft's argument. Court proceeds to decision.

Motion to Dismiss is granted.

Mr. Durkin raises additional argument. Mr. Rey

1956

nolds in reply. Court rejects Pltff's further contention. Jury returns to Courtroom and Court informs jury of the decision and discharges jury from further consideration of the case. ORDER entered and filed granting Deft's Motion to Dismiss. CASE DISMISSED.

6 Pltff's Petition to Withdraw Exhibits entered and filed. Pltff's Exhibits 1 to 4, inclusive given to M. Louis Abedon, Esq.

28 NOTICE OF APPEAL filed by Pltff. (Copy of said notice mailed to Francis V. Reynolds, Esq. and Owen P. Reid, Esq.) Cost Bond on appeal filed.

July 30 Pltff's Motion for Extension of Time for Filing Record on Appeal together with Order thereon extending time to September 7, 1956 entered and filed.

Aug. 2 Reporter's Transcript of Deft's Motion to Dismiss filed.

20 Pltff's Motion for Extension of Time for Filing Record on Appeal together with Order thereon extending time to September 22, 1956 entered and filed.

Sept. 10 Reporter's Transcript of Testimony of Frederick N. Lyman and John P. Brady filed.

14 Stipulation re omissions from record on appeal filed.

A True Copy
Attest:

(s) NEALE D. MURPHY [SEAL]
Clerk.

COMPLAINT.

Plaintiff, Whit Mason, residing at Mount Olive (P.O. Box 82) Covington County Mississippi says:

1. The plaintiff, Whit Mason, was and is a resident and citizen of the State of Mississippi.

2. The defendant, The American Emery Wheel Works, is a corporation organized and existing under the laws of the State of Rhode Island and is a citizen of the State of Rhode Island, having its principal office located in Providence.

3. The matter in controversy herein exceeds exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

4. On February 10, 1953 the plaintiff, Whit Mason, was employed by the T. H. Pierce Company, Forrest County, Mississippi and in and during said employment was required and did operate and use a certain grinding machine commonly known as a Bench Grinder, thereto which was attached certain Emery grinding wheels and while so employed and properly using the Bench grinding machine with the Emery grinding wheels attached for the purpose for which they were intended, one of the said Emery grinding wheels suddenly and without warning, split, cracked, disintegrated and shattered causing the said Emery wheel or parts thereof to become disengaged from the said machine and parts of the wheel to thereby violently strike the plaintiff causing the injuries more particularly hereinafter set forth.

5. On a date prior to February 10, 1953 the defendant, The American Emery Wheel Works, did manufacture and make certain Emery grinding wheels for attachment to a certain machine commonly known and referred to as a Bench Grinder which said machine with the Emery grinding wheels attached thereto was being employed and properly used on February 10, 1953 by the plaintiff, Whit Mason,

for the purpose for which they were intended, at said time and place and the defendant knew, or should have known, that if the said attached Emery grinding wheels were produced and manufactured improperly and were improperly inspected and tested, then persons, including the plaintiff lawfully using the said Bench machine with the attached Emery wheels thereto would be exposed to danger including the injuries inflicted and visited upon by the plaintiff, Whit Mason.

6. It thereby became and was the duty of the defendant, to exercise reasonable care in the manufacture, construction, production, inspection and testing of the said Emery Grinding wheels which were attached to the said Bench Grinder so as to render the said Emery wheels reasonably fit for the purpose for which they were intended.

7. Notwithstanding and disregarding its duty as aforesaid, the defendant by its agents, servants and employees, so negligently, carelessly and improperly manufactured, constructed, produced, inspected and tested the Emery wheels which were attached to the said Bench Grinder that as the proximate results thereof, the said Emery grinding wheel was caused to split, crack, disintegrate and shatter thereby striking the plaintiff, Whit Mason causing the injuries hereinafter more particularly set forth.

8. As the proximate result of the negligence of the defendant, said plaintiff suffered serious and permanent bodily injuries including a compound fracture through the skull overlying the left frontal sinus causing him great pain, disability, discomfort and disfigurement and he will in the future suffer great pain, disability, discomfort and disfigurement and he was and will in the future be prevented from performing his normal functions and attending to his employment which he otherwise would have been able to do and he was and will in the future be obliged to

expend large sums of monies for medical surgical and hospital care for his said injuries.

Wherefore, plaintiff, Whit Mason, demands judgment against the defendant, The American Emery Wheel Works, a corporation, in the sum of $125,000.00 and costs.

Plaintiff claims a trial by jury.

(s) M. Louis Abedon
M. Louis Abedon
1019 Hospital Trust Bldg.
Providence, R. I.

(s) Thomas E. Durkin, Jr.
Thomas E. Durkin, Jr.
24 Branford Place
Newark 2, N. J.
Attorneys for the Plaintiff

Thomas E. Darkin, Jr. is designated trial counsel.

(s) M. Louis Abedon
(s) Thomas E. Durkin, Jr.

ANSWER.

1. The defendant admits the allegations in paragraph 1 of the Complaint.

2. The defendant admits the allegations in paragraph 2 of the Complaint.

3. The defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint.

4. The defendant denies each and every allegation contained in paragraph 4 of the plaintiff's Complaint, except that the defendant admits that the plaintiff was employed by T. H. Pierce Company.

5. The defendant denies each and every allegation contained in paragraph 5 of the plaintiff's Complaint except that the defendant admits that it was in the business of

manufacturing emery grinding wheels but specifically denies that it manufactured the emery grinding wheel involved in this case.

6. The defendant denies each and every allegation contained in paragraph 6 of the plaintiff's Complaint.

7. The defendant denies each and every allegation contained in paragraph 7 of the plaintiff's Complaint.

8. The defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the plaintiff's Complaint.

First Defense

The Complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

The alleged right of action set forth in the Complaint did not accrue within two (2) years next before the commencement of this action.

Third Defense

The defendant says that it owed no duty to the said plaintiff.

Fourth Defense

The defendant says that it owed no duty to the said plaintiff as there is no privity of contract between the plaintiff and the defendant.

Fifth Defense

The defendant denies that it manufactured, constructed or produced the alleged emery wheels which the plaintiff claims were attached to a certain bench grinder.

SIXTH DEFENSE

The defendant says that the plaintiff was guilty of negligence.

SEVENTH DEFENSE

The defendant denies that it was guilty of negligence in manner or form as the plaintiff has complained against it.

EIGHTH DEFENSE

The defendant says that the plaintiff assumed the risk of being injured.

NINTH DEFENSE

The defendant denies that it improperly inspected and tested any emery wheels manufactured by it.

TENTH DEFENSE

The defendant denies that there was any duty on its part to the plaintiff to exercise reasonable care in the manufacture, construction, production, inspection and testing of grinding wheels, which were attached to a bench grinder.

ELEVENTH DEFENSE

The defendant denies that it owed any duty to the plaintiff to render emery wheels reasonably fit for the purpose for which they were intended.

TWELFTH DEFENSE

The defendant says that the plaintiff accepted payments of workmen's compensation for the alleged injuries and has thereby already elected his remedy.

By its Attorney,

(s) FRANCIS V. REYNOLDS

FRANCIS V. REYNOLDS
724 Industrial Bank Building
Providence 3, Rhode Island

TRANSCRIPT OF EVIDENCE.

[6] WHIT MASON, Sworn.

Direct examination by Mr. Durkin:

Q 1. Mr. Mason, will you tell us where you reside? A. I didn't understand you, sir.

Q 2. Where do you live? A. Mount Olive, Mississippi.

Mr. Reynolds: Can't hear.

The Court: You will have to keep your voice up, Mr. Mason, as much as you can.

Mr. Durkin: Mount Olive, Mississippi.

Q 3. How long have you lived in Mount Olive, Mississippi? A. 35 years.

The Court: A little louder now.

Q 4. In February of 1953, Mr. Mason, by whom were you employed? A. T. H. Pearce.

Q 5. Where were they located? A. Hattiesburg, Camp Shelby, Mississippi.

[7] Q 6. Can you tell us whether or not, Mr. Mason, during the early part of February, 1953, you had occasion to go to the Komp Equipment Company in Hattiesburg, Mississippi? A. I did, sir.

Q 7. Your answer to that was you did? A. I did, sir.

Q 8. Can you tell us whether or not you went there by yourself or whether or not someone else was with you? A. Somebody else was with me.

Q 9. Who was that someone else? A. Mr. Hamilton.

Q 10. Who is Mr. Hamilton? A. That is all I know of him.

Mr. Reynolds: What was his name.

Mr. Durkin: Hamilton; H-a-m-i-l-t-o-n.

Q 11. Is that correct? A. Yes. Mr. Hamilton.

Q 12. By whom was he employed? A. T. H. Pearce & Company.

Q 13. Your same employer? A. Yes, sir.

Q 14. Can you recall the approximate date that you were at Komp Equipment Company? A. Around the 6th; around the 5th or 6th.

[8] Q 15. Can you tell us what day of the week that was? A. On a Friday.

Q 16. What was your purpose, Mr. Mason, in going to the Komp Equipment Company?

Mr. Reynolds: I object to that, your Honor please, the purpose. What he did when he went there is one thing; what he had in mind to do is something we could hardly cross-examine on.

The Court: I think that is so. Let him tell us what he did.

Mr. Durkin: I will withdraw it.

Q 17. When you went to Komp Equipment Company tell us what was done. A. Well, the purpose in going there was to buy a grinding stone, grinding machine, emery wheel.

Mr. Reynolds: I move to strike that out.

The Court: Let him tell us what he did. The answer may be stricken. There is merit in Mr. Reynolds' position. You can't very well cross-examine one's purpose in doing something. Technically I think it is a sound objection.

Mr. Durkin: I will withdraw it, sir.

Q 18. When you went there, Mr. Mason, when you went to Komp with Mr. Hamilton— First of all, where had you been [9] before you went to Komp Equipment Company? A. Camp Shelby where I worked.

Q 19. You came from Camp Shelby to Komp Equipment? A. Yes.

Q 20. How did you get there, Mr. Mason? A. Pickup truck.

Q 21. When you went to Komp Equipment Company tell us what was done and what you did. A. Well,—

Q 22. Excuse me. The Court has ruled. Just tell us what

you did and what was done while you were there. A. We bought a grinding machine.

Q 23. You bought a grinding machine? A. Yes, sir.

Q 24. This grinding machine that you ultimately bought, did you take that machine away later on? A. That day.

Q 25. That day? A. Yes, sir.

Q 26. Can you tell us, Mr. Mason, when you first saw this particular machine, this grinding machine that you eventually purchased and took away, where was that machine the first time you saw it?

Mr. Reynolds: I object to that, your Honor. He [10] talks about this man eventually purchasing it. It is included in the question.

The Court: He said, "We bought a grinding machine and took it away that day."

Mr. Reynolds: Did counsel mean Mr. Mason personally bought this wheel?

Mr. Durkin: I don't think that was the question.

Mr. Reynolds: If that wasn't the question, I think the objection is good. It is going to get in this case this man purchased in the sense of buying title.

The Court: You mean for himself.

Mr. Reynolds: I think that should be excluded.

Mr. Durkin: I will consent to the exclusion.

The Court: The part of the answer, "We bought a grinding machine," may be stricken.

Q 27. You took the grinding machine away with you. Is that right? A. Yes, sir.

Q 28. That grinding machine you took away with you, tell us, Mr. Mason, where that machine was in Komp Equipment Company when you first saw that machine. A. Over near the front in a cardboard crate.

Q 29. It was still in a cardboard crate when you saw it? A. Yes, sir.

[11] Q 30. Can you tell us whether or not that crate was

open at this time or whether it was closed? A. It was closed.

Q 31. Can you tell us whether or not, after you first saw it, it was open at any other time? A. We opened it there.

Q 32. Who opened it, Mr. Mason? A. One of Mr. Komp's men.

Q 33. Were you present when he opened it? A. Yes; I and Mr. Hamilton both.

Q 34. After you first saw this cardboard carton in which this machine was for the first time did you look into the box itself, the carton? A. Yes, sir.

Q 35. Tell the Court and jury, if you will, Mr. Mason, just what you saw in that carton. A. After we opened the carton we seen a machine down there.

Q 36. Was there anything else in the box besides the machine? A. Nothing, no more than some other cardboard around the end of the machine. We lifted it out of the crate.

Q 37. Tell us how the cardboard was located in that carton. A. By each end of the machine, by the rocks.

The Court: Can the jury hear the witness?

A Juror: It all sounds like a hum.

[12] (Microphone adjusted for witness.)

Mr. Durkin: Would you just say your name into that now?

The Witness: Whit Mason.

The Court: Is that better? You speak right up now, Mr. Mason. We will get along all right.

Q 38. Now the cardboard you say that you saw, was that to the outside of the machine in between the sides of the box? A. It was, sir.

Q 39. After you saw this tell us what happened next. A. We lifted it out of the case it was in and set it on the floor.

Q 40. Were you there when that machine was taken out of that carton? A. I was.

Q 41. Tell us what occurred next. A. We set it on the floor and then he plugged it into the wall, and I stood back a little bit.

Q 42. You stood back a little bit when the machine was being plugged in. Is that what you said? A. Yes, sir. I was already looking around.

Q 43. How long was this machine plugged in, would you say? A. He turned it on then after he got the juice to it, let it run there two, three minutes.

[13] Q 44. Did you just say that the machine ran? Did it actually run? A. Yes, sir; I did.

Q 45. After this was done to the machine, Mr. Mason, can you tell us what was done next? A. I and Mr. Hamilton talked there, and he asked me—

Mr. Reynolds: I object to any discussion.

Q 46. No conversation, Mr. Mason; just tell us what you saw, and so forth. Don't say what you said. A. We took the machine. We bought the machine.

Mr. Reynolds: I move the word, "bought," be stricken.

Mr. Durkin: May I stipulate to expedite time this man did not make the purchase in his own name, for his own equity, but it was purchased on behalf of his employer.

Mr. Reynolds: I appreciate all that but I still don't like to have this man using the word, "bought," in his testimony.

The Court: It is difficult sometimes—

Mr. Reynolds: Your Honor won't object if I move to strike it out.

The Court: You may move to strike it out. And you stated for the record, Mr. Durkin, that the plaintiff [14] neither personally bought this machine nor acquired title to it.

Mr. Durkin: Yes, sir.

Q 47. After the machine was tested, and so forth, can you tell us what happened to the machine then? A. It was placed back in the crate and it was lifted out.

Q 48. Who put it in the cardboard carton? Who put it in there? A. Mr. Komp's man, the man we bought it from.

Q 49. Can you tell us, just after he put the machine back in, what else he did, if anything? A. He placed those cardboard back by each end of the machine.

Q 50. After that was done can you tell us what happened next? A. They loaded it onto the pickup.

Q 51. Who loaded it onto the pickup? A. Mr. Komp's men. They loaded it on board.

Q 52. You say the pickup, Mr. Mason. Is that the pickup you came from Camp Shelby in? A. Yes, sir; it was.

Q 53. After it was loaded on the pickup can you tell us where it was taken then? A. To Camp Shelby.

Q 54. Where specifically in Camp Shelby? [15] A. The shed where I worked there.

Q 55. After you arrived at the shed where you worked can you tell us what next happened with this particular machine? A. It was unloaded there and placed in a building there.

Q 56. By building do you mean your shed? A. My shed I worked in.

Q 57. Who unloaded the machine from the pickup truck and brought it there on the bench in your work shed? A. I and Mr. Hamilton.

Q 58. After the machine was taken from the truck and placed on this bench tell us what happened then. A. Placed it on the bench. Lifted it out of the crate first. Placed it on the bench. Then I marched around the machine after placing it on the table, getting it out of the crate that it was in. We set it on the bench, on the work bench there, and then I bored some holes through the work bench.

Q 59. Why did you do that? A. To bolt it down there; fasten the machine on the bench.

Q 60. Was the machine bolted down to this bench? A. It was, sir.

Q 61. Who bolted it down, Mr. Mason? A. I did myself.

Q 62. Tell us what you used to bolt this machine down. [16] A. I used a $\frac{3}{8}$sths bolt and a tap and washer under the machine and stuck the bolt down through the top part of the machine.

Q 63. Why did you do that? A. Well, it was necessary that I should do that. I had always done it. You can't work with a machine unless it is bolted down on the table some way.

Q 64. Mr. Mason, I neglected to ask you previously approximately how many years have you been associated with grinding machines and working with grinding machines? A. Around 30 years.

Q 65. After the machine was affixed or bolted to this bench tell us what you did next, Mr. Mason. A. I looked the machine over; glad to have it; and seen that it was—looked at the r.p.m. on the machine.

Q 66. Looked at the r.p.m. on the machine? A. Yes, sir.

Q 67. Did you learn what the r.p.m. on the machine was? A. I did, sir.

Q 68. Can you tell us what it was? A. 3400.

Q 69. Are you sure that that machine had an r.p.m. of 3400? A. I am sure I seen 3400.

Q 70. And can you tell us what you did next, Mr. Mason? [17] A. I can, sir.

Q 71. Will you do that for us? A. I pulled the guards off the end of the machine and moved the rocks.

Q 72. Mr. Mason,—

Mr. Durkin: I must apologize; I overlooked another question.

Q. (Continued) —when you were at Komp Equipment

Company, can you recall the name of the machine that you took away to Camp Shelby with you? A. I think I can; Miller.

Q 73. Millers Falls? A. Miller Falls; that is right; yes, sir.

Q 74. And it was a Millers Falls machine that you took from Komp to Camp Shelby. A. Yes, sir.

Q 75. And all that you have testified so far, as best you can recall, occurred on Friday, February 6, 1953. A. Yes, sir; it was on Friday.

Q 76. I show you a machine, Mr. Mason, and ask you whether or not this is the machine or type machine that you purchased or that was purchased and taken by you from Komp Equipment Company on that particular day. A. It is just like it. I don't know if that is the particular [18] machine or not.

Q 77. Will you step down, Mr. Mason, please?

(Witness descends from witness chair)

Mr. Reynolds: If that is not the machine involved, I object to any questions directed to it. Bringing a machine that isn't the one involved, we will get all tangled up in this case. It would be very confusing to the jury if this is not the machine involved. I don't see the point of it.

Mr. Durkin: The offer at this time is for identification. The machine, if I may, is labeled a Millers Falls Tool Ball Bearing Machine. There have been depositions taken in this case identifying the machine that was sent by Komp through this man to his employer as being a Model 77 machine. This is a Model 77 machine. And at this time, although I do expect to prove that this is the express machine involved, at this time the offer is that is an identical, if not the same, machine.

The Court: With that assurance I will allow the inquiry.

Mr. Reynolds: Do I understand you claim this is the identical machine in connection with Mason's injury?

Mr. Durkin: Yes, I do.

[19] Mr. Reynolds: You are going to prove that this is the machine?

Mr. Durkin: I am going to attempt to prove that this is the machine involved in this accident, yes.

Mr. Reynolds: Not one similar to it but the actual machine that Mr. Mason claims he was working on at the time he suffered his injury.

Mr. Durkin: I think you have stated my contention quite adequately.

Mr. Reynolds: There is no question pending is there?

The Court: I think not.

Mr. Durkin: With the Court's permission, I have an emery wheel which I, for purpose of explanation and for the procedure followed, would ask the Court's permission to insert this particular emery wheel on this particular machine for this defendant to demonstrate to this jury just exactly what he did when this machine was taken back. I will show the wheel to the Court and to Mr. Reynolds before I offer it for this purpose.

The Court: Very well; you may do so. Do you want to step to the bench?

(Conference at the bench between the Court and counsel)

[20] Mr. Durkin: All right to start?

Mr. Reynolds: I am just observing.

Mr. Durkin: Thank you, sir.

Q 78. Mr. Mason, after you checked the machine to see what the r.p.m. was on the machine, show us just exactly what you did to the machine that you had on that bench at that time which you had purchased or which was gotten from Kemp Equipment Company. A. I takes the machine, looks at it like this, find the r.p.m. on the machine—find the r.p.m. on the machine. Mind if I turn it around a little?

Q 79. No, not at all. A. I did it like this. (indicating)

Q 80. Like this? You mean you spun the wheels? A. I did it like this. I turned it like this. I says, "Well, I had better check the rock."

Q 81. What were you to check the rock for? A. I want to see what r.p.m. was on the rock.

Q 82. Why was that necessary? A. I always was taught to do that and I hadn't gotten out of it. It was safe to do it. If the r.p.m. is greater than the r.p.m. on the motor, then it is all right. If it isn't, why, then, it wouldn't be.

Q 83. One other thing if I might interrupt you. Will you show [21] the jury at this time where the bolt holes were that you bolted the machine down with? A. Right down in the center, under about each rock in the center of the machine.

Q 84. Just go ahead. I am sorry for interrupting you. It is understood, Mr. Mason, this rock has nothing to do with this particular accident. It is just on for you to be able to demonstrate. When you took the wheel off what did you do then? A. I looked the wheel over like this. I had taken the wheel off and looked at the r.p.m. on that wheel.

Q 85. What was the r.p.m. on that wheel? A. 3600.

Q 86. Are you sure of that? A. I am sure of it.

Q 87. Can you tell us what was the color of that label? A. It was white and blue.

Q 88. The background was blue or white? A. The background was white and the letters were blue.

Q 89. At the time you took that wheel off and looked at it can you tell us whether or not there was a name on that particular label? A. Yes, sir; there was a name on it.

Q 90. Can you tell us what that name was? [22] A. Well, now, I can't read so well and I wasn't interested in reading. I just looked at the r.p.m. Then I knew there was a name there.

Q 91. You can't recall what that name was? A. I can't recall what it was.

Q 92. You are sure of that? A. I am sure of that.

Q 93. You remember it was a 3600 r.p.m. and it was blue and white. A. Yes, sir.

Q 94. What else did you do to the wheel while you had it off? A. I put it down on the table and I went to the other side and removed the rock over there.

Q 95. While you had the wheels off, besides looking at that label for the r.p.m. notation, did you do anything else to the wheels? A. Yes, sir; I did.

Q 96. What did you do? A. After I removed that one I seen it had the same r.p.m. I had taken the rock and looked it over like this. (indicating)

Q 97. What were you looking for? A. Usually it is necessary. If you have any cracks in the rock you wouldn't want to use it.

[23] Q 98. Can you tell us whether or not there were any cracks on that particular rock? A. There was not, sir.

Q 99. Did you look over the entire rock? A. I couldn't look over the entire rock because this label was on it and I couldn't see under there.

Q 100. Aside from the portion of the rock that you had that was covered by the label did you look over the rest of the rock? A. I did, sir.

Q 101. Of course, if there was something under that label you couldn't see it. Is that correct? A. That is correct.

Q 102. After you inspected the rock show us what you did then. A. I replaced the rock back on the machine just like this, and placed this washer back, the tab. (indicating)

Q 103. You refer to this as a what, a tap? A. Yes, a nut. I do it like that. I said, "Well, I had better check it like this to see if it had a play up and down on the shaft."

Q 104. Did it? A. It did not. Then I got my wrench, tightened the nut good and tight.

Q 105. Why did you do that? [24] A. Well, that is what you have to tighten the rock on to hold it.

Q 106. You tightened it with a wrench? A. Yes, sir.

Q 107. Tell us or show us what you did. A. I placed the rock back on like this, and I turned the wheel like this. (indicating)

Q 108. Why did you do that? A. See if it would have any wobble or anything—it would sway. You might see a sway.

Q 109. Was there any sway or any wobble? A. Didn't have any.

Q 110. Mr. Mason, the wheels you took off on that particular machine and examined, can you tell us whether or not those wheels were new or used wheels? A. They were new wheels.

Q 111. Are you sure of that? A. I am sure of that.

Mr. Durkin: I think you might go back now, Mr. Mason, please.

(Witness returns to witness chair)

Q 112. After you performed the functions as you have just gone through—you did the things you just did—what did you do then?

Mr. Reynolds: "Did the things you just did"?

[25] Q 113. The things you have just gone through that you say you did on February 6, 1953, after you put the wheel back on and made the different tests, and so forth, tell us what you did next? A. I noticed a wall plug and plugged it into the wall close to it.

Q 114. After you plugged the machine in what did you do then? A. I come back and turned the machine on there by the switch.

Q 115. Did it work? A. It worked.

Q 116. And did the wheels go around? A. They did, sir.

Q 117. Now that is all on, as I recall, Friday, February 6th. Is that correct? A. I didn't understand you, sir.

Q 118. Everything that you did or testified that you did so far was on February 6, 1953. Is that correct? A. That is correct, sir.

Q 119. Now can you tell us how late on February 6th you worked that particular day? A. 4:30.

Q 120. This shed that you referred to as your work shed, can you tell us how many other men work in that shed? A. None, sir; myself.

[26] Q 121. You are the only one that works in that shed? A. The only one.

Q 122. When you left at 4:30— Is that your usual quitting time? A. Yes, sir; it was.

Q 123. Can you tell us whether or not this machine was on or off when you left? A. It was off, unplugged, out of the wall.

Q 124. It was unplugged from the wall? A. Yes, sir; no current there at all.

Q 125. Can you tell us whether or not the door— Tell us what the condition of the door to this shed was when you left it? A. It was locked, sir.

Q 126. Who locked it? A. I did myself.

Q 127. Now the next day is Saturday. Did you work on Saturday? A. I did, sir.

Q 128. Can you tell us approximately what time you came to work? A. 6:45.

Q 129. Was that your usual starting time? A. It was, sir.

Q 130. Can you tell us whether that door to your shed was open or locked when you reported for work? A. It was locked.

[27] Q 131. Was it opened later on? A. It was.

Q 132. Who opened it? A. I did myself.

Q 133. While you were working on that Saturday can you tell us whether or not you used the machine that had been purchased the day before from Komp Equipment Company? A. I did, sir.

Q 134. Can you tell us whether or not, Mr. Mason, you used one or both wheels on that machine? A. I used both.

Q 135. Are you sure of that? A. I am sure of that.

Q 136. Can you tell us, if you can recall, what you sharpened or what you used on that machine on Saturday, February 7th? A. I can, sir.

Q 137. Tell us a few of the things, if you can recall? A. A water pump propeller.

Q 138. Water pump propeller? A. Yes, sir.

Q 139. Anything else? A. I ground it off and smoothed it off and I repaired the pump.

Q 140. Can you tell us whether or not you used anything else on [28] the machine that day? A. I can, sir.

Q 141. Tell us some of the other things that you can recall. A. I sharpened some shovels on there and some other stuff that we had welded there for water pumps and things.

Q 142. Can you tell us whether or not you used both wheels about the same amount of time or whether you used one of these wheels more than the other wheel? A. I used one more.

Q 143. Which wheel? A. Coarse wheel.

Q 144. The coarse wheel was located on the left or right-hand side? A. On the left hand side.

Q 145. And the fine wheel was on which side? A. The right.

Q 146. Which of these two wheels did you say you used more on this Saturday? A. The one on the left.

Q 147. The coarse wheel? A. The coarse wheel.

Q 148. How long approximately did you work on Saturday? I guess that would be February 7th. A. Yes.

[29] Q 149. How late did you work that day? A. 3:30.

Q 150. Can you tell us whether or not anyone else was in that shop or working on this Saturday? A. No one in the shop.

Q 151. Was anyone else working in the vicinity around there? A. Someone was there; yes, sir, around. I don't know who it was.

Q 152. On the 8th—I understand that would be a Sunday—did you work on Sunday? A. No, sir.

Q 153. Are you sure of that? A. I am sure.

Q 154. To go back a minute, when you left the shop, your work shop, your shed, however you referred to it, on Saturday, can you tell us whether or not this machine was left running? A. It was not running.

Q 155. And when you left your shed on Saturday can you tell us whether or not the door to that shed was locked or unlocked? A. It was locked.

Q 156. Who locked it? A. I did myself.

[30] Q 157. You said, I understand, that you did not work on Sunday. A. No, sir.

Q 158. Did you work the following day, the 9th, Monday? A. I did, sir.

Q 159. Can you tell us approximately what time you reported for work? A. 6:45; around 6:45 every morning.

Q 160. How late did you work that Monday? A. 4:30.

Q 161. When you reported to work on Monday morning can you tell us whether or not that door to your shed was open or locked? A. It was locked.

Q 162. Who opened it that day? A. I did myself. Sir, no one was permitted to carry a key to that building but myself; no one allowed in it.

Q 163. Let me ask you a question, Mr. Mason, if I may. Were there any other emery wheels or rocks of any character or of any description stocked by T. H. Pearce in your work shed in February of 1953? A. None, sir.

Q 164. Are you sure of that? A. I am sure they didn't have anything like that.

Q 165. Did you use the machine on Monday? [31] A. Well, off and on, about 4 hours, 3 or 4 hours, I would say; 4 hours.

Q 166. This is on Monday. A. On Monday.

Q 167. Can you tell us what you used on the machine on Monday? A. Well, different things I welded, and repairing of things, grind them down, get them ready, a few more tools, sharpening axes, and things like that.

Q 168. Can you tell us on Monday whether or not you used both wheels on the machine about the same amount of time or did you use one of the two wheels a little more or more than the other? A. I always used the coarse rock the most.

Q 169. You used the coarse rock more than you used the fine rock. Is that correct? A. That is correct.

Q 170. When you left the shop on Monday can you tell us whether or not this machine was running at that time? When I say— Excuse me. When I say this machine I mean the machine that was located in your shop on that particular day. A. Well, it was not running. It was unplugged from the wall, no current to it.

Q 171. Do you know whether or not the door to your shed was [32] locked or unlocked as you left on Monday? A. It was locked.

Q 172. Who locked it? A. I did myself.

Q 173. The following morning or Tuesday morning can you tell us whether or not you worked that morning? A. Yes, sir; I went to work.

Q 174. Sir? A. Yes, sir; I went out on the job.

Q 175. Can you tell us approximately what time you reported to work that day? A. 6:45.

Q 176. When you reported to work can you tell us whether or not the door was locked or unlocked? A. It was locked.

Q 177. When you reported for work was this machine running or was it off? A. It was off.

Q 178. You say you reported to work about 6:45? A. Yes, sir.

Q 179. Tell us what you did on Tuesday morning, Feb-

ruary 10th; after you went to work, reported to your shed? A. I goes out to the shed and opened up. One of the foremans came to me and asked me—

[33] Q 180. You can say the foreman came to you but don't tell us what anybody said to you. Just tell us what you did. A. I sharpened some shovels.

Q 181. And you sharpened some shovels on the machine you had there? A. I did, sir.

Q 182. Did you have more than the one machine or just the one? A. Just the one.

Q 183. Just the one? A. That is all.

Q 184. And all the sharpening and grinding you are referring to was all done on this one machine. Is that correct? A. That is correct.

Q 185. On Tuesday morning you were sharpening shovels. Is that correct? A. Correct, sir.

Q 186. Now can you tell us whether anything happened to you on that particular Saturday morning? A. I am sorry?

Q 187. Tuesday morning. A. Yes, sir.

Q 188. What was it? A. The rock exploded there.

Q 189. And what happened? [34] A. Knocked me out, busted my skull, head.

Q 190. Just tell us, tell us where it struck you. A. In the head.

Q 191. What part of your head? A. On the hole here.

Mr. Durkin: Indicating, if I may, the forehead above the left orbit.

Q 192. When the wheel exploded can you tell us what you were doing? A. Grinding on a shovel.

Q 193. And can you tell us which of the two wheels you were using at the time of the explosion? A. I was using that fine rock, the one to the right.

Q 194. The front of the shovel— Was it a metal shovel? A. Yes, sir; it was a metal shovel.

Q 195. Can you tell us whether or not the shovel itself was of a thick metal or of a thin metal? A. Thin.

Q 196. Thin metal? A. Yes, sir.

Q 197. Can you tell us whether or not it was a— Describe the shovel. Was it pointed, square, or how was it? A. Square pointed shovel.

Q 198. The front or the square part that you say, approximately [35] how wide was the front of that shovel? A. 8 inches or around 8 inches, I would say.

Q 199. Mr. Mason, had you sharpened any similar shovels on this particular machine that you were using prior to the time that this wheel exploded? A. I had sharpened several of them there.

Q 200. Had you ever sharpened shovels on a similar machine before that?

Mr. Reynolds: I object to that. I don't think that is relevant to this case, what he did some other time with some other machine under some other circumstances. I don't see how that is relevant in this case. It is apt to be quite confusing here.

Mr. Durkin: I will withdraw the question if there be no question after this witness has finished with his testimony that this was a proper procedure for a man of his experience with a grinding machine.

Mr. Reynolds: I think it was a very improper procedure, your Honor.

The Court: I will allow the question.

Q 201. Now, Mr. Mason, tell us approximately, if you can recall, how many times had you sharpened a shovel under similar circumstances—a similar shovel on a similar machine.

Mr. Reynolds: I object. I don't want to harass [36] the Court. I just want my objection noted since he asked a new question.

The Court: You are within your rights. Objection noted and overruled.

Q 202. How many other shovels did you sharpen like that?

Mr. Reynolds: I will object; same reason.

Mr. Durkin: I will have my question read if I may.

(Question No. 201 read by reporter)

A. Several hundred shovels.

Q 203. Several hundred shovels? A. Several hundred shovels.

Q 204. After you recall being struck in the forehead where your head—where you pointed before, can you tell us, please, what is the next thing you recall? A. I didn't understand, sir.

Q 205. I will try to state it again. After you were struck by the emery wheel in the head, tell the jury where you were or what the next thing is that you remember after that. A. On my way to the hospital. I mean Forrest General Hospital.

Q 206. How were you being taken to the hospital, Mr. Mason? A. By car.

[37] Q 207. Do you recall who took you to the hospital? A. I cannot, sir.

Q 208. Did you see the men who took you to the hospital? A. I did.

Q 209. Did you recognize them as anyone working around your shed, or so forth? A. No, sir; I cannot. They wasn't working around my shed.

Q 210. How long were you confined, if you were confined, to the Forrest General Hospital? A. Eight days.

Q 211. While you were confined to the hospital, Mr. Mason, can you tell us what doctor was taking care of you? A. Dr. Bynum.

Q 212. B-y-n-n-m? A. Correct, sir.

Q 213: After you were discharged— Let's see. You were

taken to the hospital on the 10th. Is that correct? A. Yes, sir.

Q 214. And you were there for eight days. A. Yes, sir.

Q 215. After your discharge from the hospital can you tell us where you were taken to then? A. My home.

Q 216. Were you under the care of any doctor after your discharge from the hospital? [38] A. Dr. Bynum.

Q 217. Can you tell us how often you saw Dr. Bynum after you left the hospital? A. Every day for five days.

Q 218. And thereafter? A. Every other day for five days.

Q 219. Did you return back to work at Camp Shelby for T. H. Pearce Company? A. I went back out on the job. I did, sir.

Q 220. Will you tell us approximately when that was? A. It was fifteen days after I was discharged from the hospital.

Q 221. Now when you went back to work for T. H. Pearce at Camp Shelby, can you tell us whether or not you went back doing the work you did before? A. No, sir; I did not.

Q 222. Can you tell the jury and the Court, if you will, please, what type of work you did at Pearce Company when you went back? A. I did the best I could, mopping up, cleaning up, trying to clean the office up; sweep the floors the best I could. I couldn't stand up. I was weak. Sat down most of the time and I would get up and mop a little bit more, sweep maybe. Hold my head down; dizziness or [39] something. I couldn't stand up.

Q 223. Mr. Mason, after you were discharged from the hospital and before you went back to work for T. H. Pearce, can you tell us how you felt during that particular period? A. I felt dizzy, trying to work and hold my head up. I would look down and go dizzy and look up and then look down. I would be the same way.

Q 224. When you say dizzy, tell us just how you felt. A. I couldn't stand up. I just wobbly; I don't know. I just

didn't have any knowledge. Just go out. I didn't know what I were doing.

Q 225. Can you tell us approximately how long you stayed working for T. H. Pearce after you went back after your accident? A. I stayed on the job till June.

Q 226. What happened in June? A. They turned me off; laid me off.

Q 227. Do you know why? A. I wasn't able to work.

Mr. Reynolds: I object to that.

The Court: I think the form of the question is objectionable. How would he know? I will sustain the objection.

Mr. Reynolds: I move to strike out the answer.

[40] The Court: He was laid off in June?

Q 228. In June? A. Yes, sir.

Q 229. When you no longer worked for T. H. Pearce—A. No longer.

Q 230. —at that time can you tell us what your condition was then? A. I wasn't able to work; I couldn't.

Q 231. Could you do the work at all that you were doing prior to June? A. No, sir.

Q 232. You couldn't sweep the floors? A. No, sir.

Q 233. Can you tell us why? A. Well, the same thing. I was—just couldn't stand up. I was getting worse.

Q 234. After you were no longer working for your former employer, the T. H. Pearce Company, can you tell us what you did generally for, let's say, the next few months? A. I didn't do anything.

Q 235. Where did you stay? A. Stayed at my home.

Q 236. Can you tell us what your condition was during that time? A. Well, I was still sick, unable to— dizziness.

[41] Q 237. Anything else? A. I got out, tried to work around when I feel some better, and find something to do.

Q 238. Did you actively look for work during that time? A. I did, sir.

Q 239. What type of work were you looking for? A. Anything I could get to do.

Q 240. Any type of work at all. After your discharge from the hospital in February of 1953 did you go back in the hospital again? A. I did, sir.

Q 241. Can you tell us approximately when that was? A. Back in October.

Q 242. Of '53? A. '53.

Q 243. Approximately how long were you confined to the hospital at this time? A. Six days.

Q 244. What hospital was this? A. Covington County Hospital.

Q 245. Covington County? A. Yes, sir.

Q 246. Can you tell us under what circumstances you were taken to the hospital? What were you doing when you were [42] taken to the hospital? A. I had a blackout.

Q 247. I think you said you were in the hospital six days at that time. A. Yes.

Q 248. After your discharge from the hospital in October where did you go then? A. Went back to my home.

Q 249. After October were you under the care of a doctor again or did you have to go back to a hospital any more? A. I did, sir.

Q 250. When was that? A. In November.

Q 251. Approximately when in November, do you know? A. It must have been around the 3rd or somewhere like that.

Q 252. Can you tell us how many days you were in the hospital then? A. Nine days.

Q 253. These confinements of February, October, and November are all in the year 1953. Is that correct? A. That is correct.

Q 254. Under whose care were you when you were in the Covington General Hospital? A. Dr. Smith.

[43] Q 255. Were you to return or did you return, I should say, to the hospital in 1954? A. I did, sir.

Q 256. Approximately when? A. In December.

Q 257. Of '54? A. '54.

Q 258. How many days were you in the hospital then? A. Eight days.

Q 259. Can you tell us the circumstances surrounding the fact that you were taken to the hospital? A. I had a blackout.

Q 260. By blackout now just tell the Court and jury what you mean. A. Just fall out. Just fall out and go. Don't know where you are or anything. Just be out.

Q 261. The only time that you were in the hospital in 1954 was in December. Is that correct? A. Correct.

Q 262. Did you return to a hospital in '55? A. I did, sir.

Q 263. In what month? A. In October.

Q 264. October of '55? A. Yes, sir.

[44] Q 265. And approximately how many days were you in a hospital at that time? A. Four days.

Q 266. What hospital was that, sir? A. Covington County Hospital.

Q 267. Were you still under Dr. Smith's care at that time? A. Dr. Smith's care.

Q 268. Were you in the hospital at all any other time during '55 other than October? A. I was not, sir.

Q 269. This year, '56. Can you tell us whether or not you were in the hospital any time in '56? A. I was, sir.

Q 270. Was it once or more than once? A. Once.

Q 271. When was that? A. In February.

Q 272. Of '56? A. '56.

Q 273. How many days was that? A. Six days.

Q 274. And who was caring for you then? A. Dr. Smith.

The Court: Mr. Durkin, when you speak of the hospital in all of these instances do you mean Covington [45] General?

Mr. Durkin: I do, sir, and I want to make that under-

stood because there will be mention of one other hospital, I do believe.

Q 275. All the confinements, Mr. Mason,—

Mr. Reynolds: For my information hasn't there already been mention of another hospital?

The Court: Apart from the original.

Q 276. The first confinement was in the Forrest General Hospital. A. That is right.

Q 277. And all the other confinements you have testified to up to now were in the Covington General Hospital. Right? A. That is right.

The Court: (To the Witness) What is it, sir?

The Witness: Could I, please, be excused for a minute?

The Court: We will take a short recess at this time.

(Recess)

Q 278. Were you ever examined or treated at the Baptist Hospital? A. I was, sir.

The Court: Would you have it appear on the record where that hospital is located through the witness?

Mr. Durkin: I will, sir. You mean as to city?

[46] The Court: Yes.

Mr. Durkin: For the record, sir, that also is in Hattiesburg.

Q 279. Now, Mr. Mason, at the time of your accident can you tell us what your hourly or weekly salary or wage was? A. $1.65 an hour.

Q 280. And tell us, Mr. Mason, before February of 1953, the date of your accident,—can you tell us whether or not you were ever in a hospital at any time before that? A. I was, sir.

Q 281. Going back to the date closest to February 10th of '53, can you tell us approximately when you were in the hospital? Tell us the year, if you can recall. A. '52.

Q 282. Can you tell us the hospital you were in then? A. In Jackson at the Charity Hospital.

Q 283. The Charity Hospital in Jackson, Mississippi? A. Jackson, Mississippi.

Q 284. Can you tell us what you were treated for? What was wrong with you when you were in the hospital in '52— in Charity Hospital? A. Kidney trouble.

Q 285. You had kidney trouble? A. Yes, sir.

[47] Q 286. Aside from the time in February of 1953 when you were struck in the head by this emery wheel can you tell us whether or not you ever received any injury to your body at any time? A. I have not, sir.

Q 287. Are you sure of that? My question, Mr. Mason, is about any other injury you ever received. Tell us if you ever received any other injury. A. I haven't had any other injury.

Q 288. Tell us if there was anything else that ever happened to you. A. Nothing until '53.

Q 289. Prior to '53, before '53? A. I lost an eye way back.

Q 290. When did you lose the eye? A. 30 years ago, 35 years ago. 35 years ago.

Q 291. How old are you presently? A. 56.

Q 292. Which eye was that, Mr. Mason? A. My right eye.

Q 293. Your natural eye was taken out? A. Yes, the right one were.

Q 294. And that is an artificial— A. Artificial eye.

[48] Q 295. What happened to your eye? A. Got a piece of steel in it changing a gear on an axle in T-Model days.

Q 296. Aside from the loss of your eye and the disturbance or the difficulty you have experienced with either your one kidney or both kidneys, can you tell us at any other time whether or not you had any serious illness, say, for the last ten years prior to February of '53? A. '52 I went to the— I had this kidney. I had a treatment for that.

Q 297. Aside from that, anything else? A. No, I hadn't had any.

Q 298. Tell me, Mr. Mason, when you had this kidney

disturbance can you tell us whether or not at that time you experienced any types of headaches? A. Never had a headache before, sir.

Q 299. Before what? A. Before any other time. I hadn't been worried when my head hurt.

Q 300. When you had this kidney difficulty did you ever experience any dizzy spells? A. None, sir.

Q 301. Did you have any trouble with your head at all in any way? A. No, sir.

Q 302. Are you sure of that, Mr. Mason? [49] A. I am sure, positive.

Q 303. Prior to the time you worked for T. H. Pearce doing this grinding work, and so forth, that you have testified to, did I understand you to say you were experienced as a grinder for approximately 30 years? A. That is right, sir.

Q 304. Can you tell us the names of any companies you worked for doing that type of work? A. I can, sir.

Q 305. Give us a few of them. A. I worked for Keyes-Darman.

Mr. Reynolds: Could you spell the name for us?

The Witness: I can't, sir. I don't have an education.

Q 306. Pronounce it as carefully as you can for Mr. Reynolds? A. Keyes-Darman.

Q 307. Any place else, Mr. Mason? A. Yes, sir.

Q 308. Just give us one or two names. A. Packard Jackson in Jackson, Mississippi.

Q 309. What other? A. Dixon Motor Company, Mount Olive, Mississippi.

Q 310. Can you tell us, Mr. Mason, how far in school did you go? A. Second grade.

[50] Q 311. In grammar school? A. Grammar school.

Mr. Durkin: May I have a minute, sir?

The Court: Certainly.

Q 312. Just one or two other questions, Mr. Mason. When

you were sharpening the shovel at the time that the wheel broke, disintegrated or exploded, and hit you in the head, was the face of the shovel touching the front of this wheel or the side of the wheel?

Mr. Reynolds: I object to that. It is a leading question.

Mr. Durkin: I will withdraw it.

Q 313. Tell us what portion of the wheel that you were using on February 10th— Tell us what portion of that wheel came in contact with that shovel. A. The front part of the wheel, the regular face of the wheel.

Q 314. Will you please come down and point exactly to this specimen or example wheel and show us? A. Right there. (Witness descends from witness chair and indicates)

Q 315. Just point to the wheel. A. I had the shovel up like this at that angle. (indicating)

Q 316. And this was an 8-inch shovel at the bottom. A. Yes, sir.

[51] Q 317. Just touch the wheel and show what part of the wheel it touched. A. Right there, I had the shovel across the stand. Right there. (indicating)

Q 318. The part that you touch with your right hand. Is that right? A. That is right.

Mr. Durkin: Indicating, if I may, for the record the front or periphery of the wheel.

Thank you, Mr. Mason.

Q 319. You said you were getting $1.65 an hour. And how many hours a week did you work, Mr. Mason? A. 48 hours.

Q 320. Can you tell us whether or not you have done any type of work since June of 1953? A. I haven't done any, sir.

Q 321. You have never received any monies for doing any work since June of 1953? A. None, sir.

Cross-examination by Mr. Durkin.

X-Q 1. Mr. Darby, will you tell us, please, by whom you are employed? A. The American Emery Wheel Works.

X-Q 2. Where are they from, sir? A. They are located at Richmond Square, Providence, Rhode Island.

X-Q 3. And that is their home office? A. That is correct.

X-Q 4. Are there any branch offices, Mr. Darby, concerning the manufacturing aspect of your business? A. No, just sales and distribution.

X-Q 5. But the actual manufacturing and processing, and so forth, all takes place here in Providence. Is that right? A. That is correct.

X-Q 6. What is your particular function with this company, Mr. Darby? A. Well, at the present time I am the president of the company and the works manager.

[457] X-Q 7. Say in 1952, what was your particular function? A. In 1952 I was works manager in charge of personnel and production.

X-Q 8. Tell us as works manager just what duties you had at The American Emery Wheel Works. A. Well, I am responsible for the production of the product, such as the scheduling and the maintenance of deliveries. I am also responsible for the manufacture of the product which consists of its preparatory manufacture, the molding—mixing, molding, finishing.

X-Q 9. As a matter of fact,— A. Everything.

X-Q 10. Everything that has to do with the manufacture of your product. A. That is correct.

X-Q 11. Do you manufacture anything aside from emery grinding wheels? A. We make grinding wheels and we make bricks, sharpening stones.

X-Q 12. First of all, Mr. Darby, you have been assisting Mr. Reynolds and Mr. Reid in the preparation of this case,

have you not? A. Well, I don't know as you would call it assisting them. Mr. Reynolds came over and wanted to see how grinding [158] wheels were manufactured so that he might know something about the product. That is about all. I think he made one visit to the plant quite some time ago.

X-Q 13. As a matter of fact, on Friday last you were in court here, were you not, sir? A. That is correct.

X-Q 14. Is it not also a fact that you consulted with Mr. Reynolds and suggested to Mr. Reynolds certain questions to be asked Mr. Mason?

Mr. Reynolds: I object. There are certain matters of privilege left for the attorney and client.

The Court: I sustain the objection.

Mr. Durkin: For the record—

The Court: There is no need to argue. The Court has ruled.

X-Q 15. Are you familiar with the fact that your particular company or corporation supplies grinding wheels to the Hoover Company in Plainfield, New Jersey? A. That is correct.

X-Q 16. Are you familiar with the type of wheels that are submitted to the Hoover Company? A. I am, sir.

X-Q 17. And may I ask you whether or not there are different types of wheels—I am not talking about size now: I am [159] talking about the components, the intrinsics to the wheel? Are they all the same or do they vary? A. You mean are the wheels that are sold to Hoover Company?

X-Q 18. Yes, sir. A. They are only different in one respect.

X-Q 19. Will you tell us what that respect is? A. We make principally for them—they are manufacturers, as you know, of the bench grinder and it is a double end machine, and they make various sizes; and we furnish or have furnished for a great many years wheels for both ends of the machine. One is known as a medium coarse wheel which

happens to be a 40 grit, and the other is the fine wheel, 60 grit. We make those in both 6-inch diameter for the very small grinder and the 7-inch, which is the type of grinder that was on display last Friday. Then we make a larger wheel—

X-Q 20. 10-inch wheel? A. 10-inch wheel; that is correct. Those are the three sizes principally. There are intermediate thicknesses we have furnished, but those are the three very common sizes they buy in great quantity.

X-Q 21. Let's take, for instance, the 7-inch wheel. A. Right.

X-Q 22. You would know that 7-inch wheel as a 7 by 1 by 1. Is [160] that correct? A. 7 by 1 by 5/8ths.

X-Q 23. 5/8ths being the core. A. That is the arbor hole.

X-Q 24. To put it on a spindle or shaft of the particular machine. A. That is right.

X-Q 25. Aside from the core, what is the correct word? A. Well, the core is all right. It is the hole, the arbor hole.

X-Q 26. Aside from that dimension and aside from the fact that they are 6, 7, and 10 inches in circumference— A. That is right.

X-Q 27. —the components, the intrinsics of those particular wheels, are they the same? A. They are except for the grit.

X-Q 28. Except for the grit? A. That is right, and the hardness. I might add the hardness.

X-Q 29. And the hardness? A. That is right.

X-Q 30. That can be regulated upon the demand? A. The formula.

X-Q 31. And when you have a notation of 60 grit, that means a finer wheel than a wheel with a 40 grit? A. That is correct.

[161] X-Q 32. The greater the grit, the finer the wheel. Is that correct? A. Naturally that is right. The 100 would be still finer.

X-Q 33. The wheels you supplied to Hoover were either 60 or 40 grit. Is that not correct? A. That is right.

X-Q 34. The grit— Can you tell us what is the grit, as we refer to it? A. Yes. I don't want to get too technical but I will try to make it as clear as I can.

X-Q 35. Without interrupting you, just tell us first what is the technical reference to— A. The abrasive?

X-Q 36. —to the grit? A. It is aluminum oxide.

X-Q 37. Aluminum oxide?. A. That is correct.

X-Q 38. That aluminum oxide or that grit, is that manufactured by your corporation or is that purchased by your corporation? A. It is purchased by our corporation.

X-Q 39. It comes in containers, does it not? A. It does.

X-Q 40. Do you have one source of supply or do you have many [162] sources of supply? A. We have various sources, not too many, three or four perhaps.

X-Q 41. More than one? A. More than one.

The Court: Mr. Durkin, just a moment. Are you referring now to the situation at the present time or the situation prior to April, 1951?

Mr. Durkin: I am referring to— I think the witness said that they do the same as far as the supply now and in '52.

X-Q 42. Is that not correct?

Mr. Reynolds: I don't think that is the testimony.

The Court: I didn't get that impression.

Mr. Durkin: If there be any doubt about it, let's go over it.

X-Q 43. What you are testifying to now—

Mr. Reynolds: Let's resolve one thing at a time.

Mr. Durkin: What would you like resolved?

Mr. Reynolds: I would like to resolve where in your questions you asked that.

X-Q 44. Do you recall my asking you, Mr. Darby, the functions, and so forth, you had in 1952? A. I do.

[163] X-Q 45. You said you were in charge of all this production, and so forth. A. That is correct.

X-Q 46. So there will be no misunderstanding, the mode of production in '52, and so forth, is that comparable to the way it is now? A. Pretty much the same; yes, sir.

X-Q 47. As far as the procuring of this initial ingredient, this grit we are referring to, that was done the same then as it is now, was it not? A. That is right; as a matter of fact, for 75 years perhaps or more.

X-Q 48. Possibly, yes. If there be any difference in the way it is done now from the way it was done prior to February of 1953, in 1952, give us the way it was done in '52 rather than the present time. And if there be a distinction and you think it a necessary distinction for us, will you please— A. No change.

Mr. Durkin: No change. Fine!

Mr. Reynolds: I would just like to get the dates cleared up. '52 has been used—

The Court: I think the Court inadvertently used '51. I just looked at my notes and this incident happened [164] in February of 1953; so Mr. Durkin's reference to '53 would seem to be proper.

The Witness: As far as my function is concerned, if you want, it has been the same with the exception of being made president in '53. I was in charge of the manufacture and production from 1947.

Mr. Durkin: We won't find any fault in the fact that you were promoted, Mr. Darby.

The Witness: I just wanted to clear that up, so that it goes back even beyond '51, your Honor.

X-Q 49. To get back to the question of the grit. This grit comes in certain types of containers, does it not? A. That is correct.

X-Q 50. When it is received at your company, tell us what the first thing—tell us the first thing that is done to

that particular grit. A. Well, the abrasive grain comes in kegs, and those kegs weigh approximately 400 pounds, we will say, and every keg— the head of every keg is opened and an envelope sample is removed. That envelope sample is sent to the laboratory for test.

X-Q 51. For what purpose? A. For grit size, for uniformity of grit size. You understand, we manufacture wheels of from 25 to 30 grit sizes [165] and since we buy from two or three different companies, we want to make sure that the grit size is consistent. And it is a Department of Commerce standard mesh that it is graded to.

X-Q 52. The grit size to be utilized in wheels depends upon the size wheel to be actually formed,—is that correct? —plus the fact whether it is going to be a coarse or fine wheel. A. I don't know as I follow you, Mr. Durkin.

X-Q 53. For instance, we have a keg here that comes in weighing about 400 pounds, and it has a content of grit. A. Yes.

X-Q 54. Take the grit out of here. May I use that same grit in a 10-inch wheel? A. That is correct.

X-Q 55. In a 7-inch wheel? A. Right.

X-Q 56. And in a 6-inch wheel? A. That is right.

X-Q 57. Do you distinguish whether or not it be a coarse or a fine wheel? A. No, that would be all 60 grit.

X-Q 58. That would be all 60 grit which would go in the finer of the two wheels? [166] A. —of the two wheels.

X-Q 59. After the receipt of the grit, distinguish for us, if you will, Mr. Darby, the distinction between grit and an abrasive. A. Well, when I refer to grit I am simply talking about a size. Perhaps it is somewhat confusing. I could have called it grain because it is. It is abrasive grain. As I say, it is aluminum oxide grain. The grit, I simply use for a size—explanation.

X-Q 60. The grain, is that comparable to an abrasive? A. That is right; it is the same.

X Q 61. Same thing? A. Same thing.

X Q 62. And the grit just distinguishes as to coarseness or fineness in size, and so forth. A. That is right.

X Q 63. When the grit is received is it mixed with anything else, after it is received, in the next step in the progess of an emery wheel? A. The first step in the manufacture of the wheel is to mix that abrasive with a bonding agent. It is the bonding agent that holds it together.

X Q 64. Now the bonding agent. Is the bonding agent the same, as far as your corporation is concerned, in the manufacture [167] of each and every wheel? Is it the same—shall I use the word, resinoid, or is that just a type of bond? A. Resinoid is a different type of wheel and a different bond. The grain would be the same but the bonding agent would be resin, either liquid or dry, but it is a resin; it is organic.

X Q 65. It is organic, yes. That also is referred to as a plasticizer, is it not? A. That is correct.

X Q 66. I might ask you—I don't want to infringe upon any type of process—is this bonding that you use or this plasticizer at your company particular to your company? I mean is it a formula only known by your company? A. In a sense, although they all pretty much are the same.

X Q 67. But yours is particular. I mean you have some particularities about it that no one else has. Is that correct? A. We like to think so.

X Q 68. As a matter of fact, you do. Isn't that right? A. That is right.

X Q 69. When this grit is— Well, tell us. Just tell all of us, you being the expert, when you start off in the process of the manufacture, try and tell us step by step, as best you can, just what is done. A. Well,—

Mr. Reynolds: I object to this, your Honor. [168] There has been no statement under what category this witness is offered by the plaintiff; and in view of their

having been no statement made, I don't think this is proper examination.

The Court: I think the plaintiff called Mr. Darby as an adverse witness under the statute.

Mr. Durkin: Rule 43.

Mr. Reynolds: He hasn't stated that. I am a little in the dark as to whether that is his purpose or not.

Mr. Durkin: I must apologize if I overlooked a procedural rule. I didn't think it necessary to state my purpose for calling Mr. Darby. I thought it could be quite obvious.

The Court: Maybe the Court made a somewhat premature assumption. I think it is clear that the plaintiff has called an official of the opposite party. If your objection goes to the line of inquiry, it seems to the Court Mr. Darby's qualification have been established. He has been the works manager since 1946, I believe he told us.—

The Witness: '47.

The Court: — '47.

Mr. Reynolds: Is he calling him as an officer or [169] agent of the defendant or is he calling him as an expert on grinding wheels? That is the 864 question that I was getting to, your Honor, I don't know.

The Court: What do you say, Mr. Durkin?

Mr. Durkin: I would say both.

The Court: The Court assumed you had. I will allow the question. Objection noted and overruled.

A. (Continued) I would like to make it clear, Mr. Durkin, I am not a chemist, but I think I can explain, if it is satisfactory, the method of manufacture.

X-Q 70. Mr. Darby, you explain to us, sir, the best you can. We want to understand how the wheels are made. I am not attempting to pick any particular shortsightedness as far as your ability is concerned. Just tell us after the grit is received what is the next step, sir. A. Assuming

the wheel has to be manufactured, a formula or shop order, as we call it, is written for the manufacture of that wheel, and that formula follows the wheel through its various processes of manufacture, of which there are many.

For the members of the jury I would state that the manufacture of a grinding wheel is not too unlike making cake or bread or anything that is made in a bakery. The grain is weighed out according to the formula, and to [170] put it bluntly, the proportion of grain to the bond, which is what brings it to a definite hardness.

Now, roughly, the more bond, the less abrasive, the harder the wheel; the less bond, the softer the wheel, if I can put it simply.

X-Q 71. At that particular—

Mr. Reynolds: Excuse me. Had you finished your line?

The Witness: Not necessarily. I can go on for hours about it.

Mr. Durkin: That is what I thought.

The Court: Perhaps a question and answer will bring us to the point more expeditiously.

X-Q 72. The formula that you mentioned, Mr. Darby, that you say follows this wheel all the way through,— A. Yes.

X-Q 73. —can you tell us whether or not—it is a fact, isn't it, that this formula is established and the wheels are made in conformity with that formula? A. That is correct.

X-Q 74. The formula isn't changed for every wheel, is it? A. As a matter of fact, we use a reference all the time and those references are kept for a period of ten to fifteen years. [171] X-Q 75. And every wheel that comes in is made in compliance with that formula. A. Our purpose is to duplicate it.

X-Q 76. In a 7-inch wheel that your company in 1952 would ship to the Hoover Company in Plainfield, New

Jersey; tell us what that plasticizer or bonding agent was at that time. A. Well, it is a ceramic material, what we call a vitrified wheel; and the bond—that is different from the resinoid—and the vitrified wheel is bonded with ceramic material or clay. We might say clay. And the purpose is the abrasive is mixed in a large mixer with the clay and it is mixed for a definite length of time, a regulated length of time. And the purpose is for each grain, each individual grain, to become coated.

X-Q 77. With the plasticizer. A. We also use a liquid material which you might refer to as glue. It isn't glue.

X-Q 78. It is a sticky substance? A. A sticky substance which simply holds the wheel together in its so-called green state before it is baked. That is just the mixing.

X-Q 79. Up to that particular point will you distinguish by definition, a layman's definition, for us between a [172] resinoid and a vitrified? A. Well, that is a little difficult to do.

Mr. Reynolds: May I have that question read, please?

(Question No. 79 read by reporter)

The Witness: I think I can answer that.

Mr. Reynolds: That seems to be an adjective. I don't know whether it means a wheel process or what it is. I think for the sake of clarity we ought to find out what he means.

X-Q 80. Mr. Darby, in any question I ask you, sir, I am specifically referring to a 7-inch wheel which your company in 1952 or thereabouts shipped to the Hoover Company in Plainfield, New Jersey. A. That is a vitrified wheel.

X-Q 81. That is a vitrified wheel.

The Court: It refers to the wheel?

X-Q 82. It just refers exclusively to the wheel. Is that right, Mr. Darby? A. That is right.

X-Q 82. Will you tell us what you mean by vitrified?

A. Well, a vitrified means that a wheel is bonded with a ceramic bond and baked in a kil at a high temperature.

X-Q 84. A kil is just an oven? [173] A. That is right, just like a potter's kil.

X-Q 85. Up to that point the purpose for the grit being exposed to this bond was to coat each and every grain of grit. Is that correct? A. Yes.

X-Q 86. And the reason for that is when the unit is completed, there is necessary a bonding, (I), between each grain of grit. Is that correct? A. That is correct.

X-Q 87. And, of course, if each grit was not properly bonded, then, of course, in the end result there would not be a proper final result. Is that correct?

Mr. Reynolds: I object to that; as to what might happen if something wasn't done; as to what was done along that line. This is purely speculative. It has nothing to do with the precise wheel in this case, which has not as yet been identified as being an American Emery wheel. I think that question would be improper.

The Court: I think the fair import of the question is to illustrate what is necessary to make a good wheel. I will allow it. Have you got the question, Mr. Witness?

The Witness: I have.

A. Then I would say that it was impossible for any individual [174] grit not to be coated with the bond. It just couldn't happen.

X-Q 88. It just couldn't happen? A. I wouldn't say that it just couldn't happen.

X-Q 89. Did you ever see a wheel in your experience, Mr. Darby, that ever contained a fissure or a crack or a void of any nature?

Mr. Reynolds: I object. This attorney cannot cross-examine his own witness. He has called him as a witness; as an expert. He can't cross-examine the expert which he has called.

Mr. Durkin: I refer Mr. Reynolds to Rule 43 of the Rules of Procedure of this court.

The Court: You don't need to argue. Go ahead.

X-Q 90. You have seen that, have you not, sir? A. Yes.

X-Q 91. Is it not also a fact that these fissures or cracks, or voids, or whatever they are, are caused by an improper binding of the grit? A. Not necessarily.

X-Q 92. But could it not be, sir? A. I do not know. No one has ever been able to tell, that I know of, what causes that because it is not—you are not able to discern that until the wheel comes out [175] of the bake, and no one can go in a kil 2600 degrees Fahrenheit and see what happens in there. So we don't know. If it came out strained, it could be strained in handling in the green state and come out that way. It wouldn't necessarily be caused by the abrasive not being coated. I have never known of it.

X-Q 93. When you say it could be as a result of the handling or it could be strained, that is one explanation for a result in fissure or crack. Is that not so? A. No.

X-Q 94. Isn't that what you just finished saying? A. That would show up before it even got to the kil. It wouldn't even get to the kil.

X-Q 95. Assume that this is a type of wheel that is under discussion and it is all finished with the entire process, and this wheel, we look at it and we find that it has a crack or fissure or void in it, did I not understand you to say that that resultant condition could be the result of handling? A. What I mean by that, Mr. Durkin, is that a workman could drop the wheel, for all we know. We don't know that. We have no way of telling.

X-Q 96. Don't you have a way of telling what has occurred? Don't you take wheels off and don't you periodically [176] look at those wheels?

Mr. Reynolds: First, we were going through a nice step-by-step process to show how these wheels came in and

we got off the track. And I think my brother is now talking about finished wheels and the witness is talking about wheels in the green state that have gone to the kil.

The Witness: That is correct.

Mr. Reynolds: For the sake of clarity I think questions ought to be precise unless he states what stage he is now talking about, or else lets the witness finish the process and asks him about some separate different points. I am just asking for the sake of clarity so we won't be confusing finished wheels with wheels in the green state.

The Witness: I would like to clear up one thing.

The Court: As I understand it, we are back now to the stage in the process prior to the wheel being put in the kil.

Mr. Durkin: I think it will be disclosed there are many intermediary steps before that occurs.

The Court: Go ahead. I don't want to limit your examination unnecessarily.

X-Q 97. Did you ever see, Mr. Darby, a wheel while it was still [177] at your factory, before it was shipped to anyone,—did you ever see a wheel with a crack or a fissure or a void in it?

Mr. Reynolds: I object to that. We are limited to a wheel that is supposed to have disintegrated and struck Whit Mason, and I don't think it is helpful to decide what might have happened in 75 years of manufacture.

The Court: How is that going to help us?

Mr. Durkin: I refer the Court to the Trowbridge case.

The Court: I haven't the case before me.

Mr. Durkin: Specifically the cases hold—I don't know whether the Court would want this out of the presence of the jury.

The Court: Come up to the bench.

(Conference at the bench between the Court and counsel as follows:

Mr. Durkin: This is the Trowbridge case I have in front

of me here, and they hold that it is perfectly proper to go into the manufacture of the type of wheel. It is impossible to go into the manufacture of this specific wheel. No one knows when that wheel was manufactured, out of what batch it came, when it was delivered. And the only way to prove improperness is to [178] establish a standard way of doing it at this particular place.

This witness has volunteered the statement that it is impossible for grit, after it has been exposed to a plasticizer, not to be fully covered. He has also said that fissures or cracks or voids are caused not by improper bonding. And that is the point that I am directing specific questions at. If that is his opinion based upon observations, I want to know what his positive findings were. That is a negative conclusion.

> "Plaintiff was unable to prove by direct evidence that any defect existed in this particular wheel. Microscopic tests conducted at Massachusetts Institute of Technology were inconclusive. Plaintiff, however, charges defendant with negligence in its method of manufacture, and in its failure to test its product properly. The nature of the evidence with reference thereto will be discussed later in this opinion."

Then it goes into the course of travel of this wheel, its life history, and so forth.

> "Defendant argues on appeal that there was no evidence of negligence because no witness identified any defect in the wheel. Defendant's version of the law would cast upon a plaintiff in a case such as this an almost impossible burden, for where an abrasive wheel disintegrates, direct proof of the existence of a defect might [179] be virtually impossible."

referring to the Zesch case.

> "The burden of the scientific limitations of our society

should not be cast on injured plaintiffs in circumstances such as existed in the instant case."

Mr. Reynolds: That has nothing to do with manufacturing. He wants to know here if some time they had a wheel broken here.

The Court: May I have the question, please?

(Question No. 97 read by reporter)

Mr. Durkin: The reason that question was asked is because this witness used the terminology that a workman might have dropped it. To exclude the possibility he is referring to anyone outside of this particular defendant or his agents, that is the purpose of that question.

Mr. Reynolds: That has nothing to do, your Honor, with the matter now in hearing. It is not an attempt to cut him off from explaining a manufacturing process, so-called. It is an attempt to introduce into this case some confusing evidence about the fact that there may have been a wheel at some time in the history of this company, which goes over a good many years, that this man saw, and they will try to argue from that that [180] because there was one around, it might have gotten on this machine. I think it is very confusing, misleading, and is not directed to the matter in issue. It is not even an attempted cross examination of this expert because the expert is talking about the green wheel, and there is no confusion on this.

This man would like to have this stuff in the testimony to pick it out of its context and claim, "Now there is your proof." I think it could be very damaging.

Mr. Durkin: If the problem causes the Court any serious concern at this juncture, I will be only too glad to withdraw it and come back to it again when there would be no question at all.

The Court: I think at the moment it conceivably can be fraught with serious difficulty because it could be that at some time or other a wheel had fissures, but it doesn't help

us, it seems to me, in proving whether or not this defendant is responsible for the accident to this plaintiff.

Mr. Durkin: This witness has acknowledged observing such conditions, but he went one step further and he said this condition, this fissure condition, could not be the result of an improper bond between [181] this plasticizer and this grit.

The Court: Granted that is so.

Mr. Reynolds: You didn't have to put a witness on—

The Court: Granted that it couldn't be due to want of proper bonding, what difference does it make if this wheel was made by the defendant? It is a defective wheel. We are not interested in whether or not at some time, at some place, there was some other wheel that might have had a fissure in it or a defect in it.

Mr. Durkin: The crux of this particular phase of the testimony is this: I am going to establish by this man the method of manufacture. If the president of this corporation enunciates an opinion from that stand that a fissure could not be the result of improper bonding between the grit and the plasticizer and this corporation operates under that impression, I think that is most proper because of potential experts' testimony to the contrary.

Mr. Reynolds: Let him put his experts on.

The Court: Are you assuring me that you are going to have other expert testimony to the effect that a fissure can result from improper bonding?

[182] Mr. Durkin: I am not only going to assure the Court of that but if there be any doubt about it, on the cases the Court was inquiring about I have the briefs right at the counsel table; not the decisions, the briefs. That question was gone into quite carefully and just this specific point was testified to by other experts.

The Court: If you are assuring me you are going to have other expert testimony presented here to the effect

that improper bonding can produce that result, then I think it is a proper sort of inquiry.

Mr. Durkin: Yes, sir.

The Court: Providing I have your assurance.

Mr. Durkin: I will assure you; there will be no question. Even my first witness tomorrow morning.

Mr. Reynolds: Aren't we working out of order? Mr. Darby will be here tomorrow, and aren't we running ourselves into a lot of difficulty by proceeding at this point when we don't know the other fellow will be here? And he hasn't tied in the wheel that is involved here.

The Court: It is a matter of degree. Go ahead.

(Conference at the bench concluded)

X Q 98. I understand, Mr. Darby, that it is your opinion and [183] your belief that a fissure in a finished product could not be the result of improper bonding between the plasticizer and a grain. Is that correct, sir? A. That is my impression.

X Q 99. And you operate your business under that impression. Is that not so, sir? A. That is correct.

X Q 100. Thank you, sir. Now, Mr. Darby, after the plasticizer is introduced to the grit, I understand you to say that both ingredients are weighed, depending upon what you want to end up with. Is that correct, sir? A. That is right.

X Q 101. Now assume that the two ingredients have been weighed and have been mixed, tell us what is the next step. A. Well, after the abrasive and the bonding agent are mixed together, the mix, as we call it, goes to the molding department for the actual molding of the wheel.

X Q 102. Will you explain to us the procedure of how the mixing is actually done? A. The mixing is done in large mixers similar to what you might see in a bakery with a revolving mixing—what do you call it? Stirrer which thoroughly mixes the abrasive for a definite length of time.

X-Q 103. What length of time? Will you tell us that?
[184] A. Fifteen minutes.

X-Q 104. Is that standard? Is that the amount of time that your company follows? A. That is correct.

X-Q 105. Each batch is fifteen minutes? A. That is correct.

X-Q 106. Then do I also understand from that that each batch, as I am using the word, contains the same amount? In other words, do you apply fifteen minutes, Mr. Darby, to a half can or to a full can, or what?

Mr. Reynolds: I think there are two or three questions in there. May I have the question, please?

(Question No. 106 read by reporter)

Mr. Reynolds: That is several questions; the amount and the time in one question, your Honor.

The Court: It seems to the Court, the import of the question was whether the time element varied depending on the quantity of the mixer. If counsel doesn't understand the question, maybe you can frame it a little more clearly.

Mr. Durkin? I will try, sir.

X-Q 104a. Assume this to be the amount of mix that is mixed for this particular batch and the stirrer stirs for fifteen minutes, instead of having that amount, if there was [185] only half of that amount, would the stirrer in that batch still operate for fifteen minutes? A. We limit our mixes to certain weights. In other words, if we had to make 500 wheels, as we very often do, for the Hoover Company, the 500 wheels could not be mixed in one batch, so to speak, and they would be limited to uniform weights of mixes and they would be all standard 15-minute mixes.

X-Q 105a. But you would divide by a common denominator so you would have the same amount of substance in that container when it was being mixed for fifteen minutes, would you not? A. That is correct. The ingredients are very standard.

X-Q 106a. As a matter of fact, the weighing process between the amount of bond and the amount of grain, that has to be done quite mechanically, does it not? A. It certainly does because you are playing with what we call two weights of every wheel, what is known as a green weight and a finished weight. If you would like me to explain the difference, I will be glad to.

X-Q 107. Will you do that for us? A. As I have stated, the abrasive grain and the clay, which is the bonding agent, and the so-called liquid, which makes the sticky substance hold together, burns out [186] when the wheel is being baked. That removes itself, so, therefore, you get a variation, a slight variation, between what we call the green weight and the finished or baked weight. After it comes out of the kil, the weight would be different than when it went in the kil.

In molding, if we mold a 7-by-1 wheel, that so-called mix is weighed out to the indefinite measurement in grams to just charge that one mold. And when that wheel is pressed in the press, it has what is known as a green weight, and each and every wheel will have that same weight.

I mention that to show you the uniformity of the weight.

X-Q 108. Actually what you have described for us there is the difference between an open and closed method—isn't that right?—of curing, and so forth. A. No.

X-Q 109. Is there an open or closed method used when the wheel is baked? A. I wish you would explain to me what you mean so I can clarify the last answer.

X-Q 110. I certainly should; I am sorry. Well, when a closed method is used, all the external surfaces of the processed [187] wheel are not exposed for evaporation. Is that correct? A. You are talking about a closed?

X-Q 111. Yes, sir. A. Yes, the mold is closed. It has a bottom plate. It has a round— The mold is the round

part itself. There is a bottom plate, a plug which makes the hole, and a top plate. And when that goes in the press, it is pressed until the mold is closed. And when that mold is closed, the wheel is a definite weight and it wouldn't make any difference whether you put 100 ton or 500 ton. If the mold is closed, it is closed. You see my point?

X-Q 112. Yes, sir; I do. Will you also tell us— Well, do you distinguish between an open method and a closed method? A. I think now I am beginning to see what you are driving at. An open method is a puddled wheel.

Mr. Reynolds: I am going to object unless my brother gives a definition of open.

A. (Continued) I would like that—

X-Q 113. To avoid that I am going to ask the witness to define what he means by open. I think it is much more important, what he means.

Mr. Reynolds: Wait a minute.

The Court: Any time objection is made, just wait before you answer until the Court has an opportunity [188] to rule. If the witness understands what is meant by an open method, he can answer.

X-Q 114. Before you tell us what either one of us understands what we mean by an open method, you define what you mean by an open method and tell us what it is, and your definition, of course, is what is binding. A. My impression of an open method would be a wheel that is never molded.

X-Q 115. Do you follow that procedure at all in a 7-inch wheel, I mean? A. No, sir.

X-Q 116. You never follow it. In other words, it is just closed. Is that correct? A. Yes.

X-Q 117. Is there any type of a wetting agent used before the wheel is baked aside from the plasticizer?

Mr. Reynolds: I think that should be limited to a 7-inch wheel in view of the other—

X-Q 118. Any question I ask you, sir, I don't mean— A. I understand you are talking about a Kingston Conley wheel.

X-Q 119. I am talking about a 7-inch wheel that your corporation sent to Kingston Conley in and about 1952. There is no trouble between you and me on that, is there, Mr. Darby?

Mr. Reynolds: I object to that.

[189] The Court: I think that is a little gratuitous. We don't need it. Let's confine the examination to the manufacture of a 7-inch wheel and we will get along a little faster.

X-Q 120. I think the pending question was as to a wetting agent. Is a wetting agent used in your process, Mr. Darby? A. No.

X-Q 121. There is no wetting agent used at the time that the grit and the plasticizer have been mixed, prior to the time that the unmolded substance—or when it is in the kiln— A. Mold.

X-Q 122. —mold, is put into the oven or kiln. A. That is correct.

X-Q 123. Will you describe for us and tell us, Mr. Darby, your method of baking in this kiln? A. After the wheels are molded, they go into a dry room, as we call it, which has a temperature of probably 150 to 200 degrees, and the wheels are left there overnight or 24 hours, we will say, after which they go to the kiln department where they are baked in a continuous or tunnel type kiln. This is a rotary type kiln which moves continuously. And the wheels are placed in what we call kiln furniture, and they make one complete revolution through the tunnel, and in that method they are baked [190] with many controls.

X-Q 124. Now the heat or the temperature that these wheels are exposed to or these molds are exposed to, after they come from the heating room into the kiln itself,

that is a gradiated temperature, is it not, sir? A. It is a graduated temperature.

X-Q 125. Until it reaches a certain level, and it is stable for a certain period of time. A. That is correct.

X-Q 126. Actually it is approximately 360 degrees Fahrenheit. A. No, sir.

X-Q 127. What is your— A. 2400 degrees Fahrenheit.

X-Q 128. For how long, sir? A. The entire baking in that kiln is for 54 hours.

X-Q 129. How long is the temperature maintained at 2400 degrees Fahrenheit? A. Well, at that particular thermocouple I would—I haven't got my complete firing record with me, but if you want an approximate—

X-Q 130. Approximately, sure. A. Possibly 6 to 8 hours or more.

X-Q 131. Then after— In other words,— A. After it reaches the peak, it decreases.

[191] X-Q 132. But at that peak you would say it is about 6 to 8 hours. Is that correct? A. Maybe a little longer.

X-Q 133. Then it decreases as the approximate time for its discharge from that kiln— A. The point is you want to cool it gradually.

X-Q 134. As a matter of fact, if it wasn't cooled gradually, if there was an abrupt cooling, and so forth, you wouldn't get a proper wheel, would you?

Mr. Reynolds: I object. We are talking about a particular wheel in Whit Mason's case. This is going to be immaterial and confusing and it is extraneous to the issue.

The Court: I think it is part of the process. I will allow it.

A. I might add, Mr. Durkin, readings of the heat at the various stages in that kiln are recorded hourly.

X-Q 135. And that is done manually, is it not? A. Well, now, I don't understand—

N Q 136. I mean a man reads them. A. He reads them from a dial or electric recording instrument, a Leeds Northrup.

N Q 137. After the procedure is completed, if one want to find out what a temperature was at a certain hour, the reading was [192] taken by a person from a dial or gadget. Is that correct? A. That is correct, but that is only one method of recording the heat. We have three.

N Q 138. Will you tell us the other two, please? A. We use pyrometric cones on every. To begin with, in the kiln there are what we call lifters. A car is contains definite number of wheels. We know at all times when every wheel is in every car. And on every car which has a load of grinding wheels there is a pyrometric cone plus a ring gauge, and those two, together with the electric reading, would indicate the heat.

N Q 139. Well, the latter two that you have described to us, is a certain temperature, a certain degree of temperature, ascertainably. A. From the cone or ring.

N Q 140. During the process? A. No, afterwards.

N Q 141. Only after? A. That is right.

N Q 142. But the only way you could find out what the heat is during the process is by this reading which is taken off manually? A. That is correct. And after the wheel came out, if it didn't have that reading, the cone would show it and the [193] ring would show it too.

The Court: We have reached our customary luncheon hour. We will stop here until two o'clock.

(Noon Recess)

AFTERNOON SESSION

2:10 P.M.

Mr. Durkin: May I, with the Court's permission and Mr. Reynolds' consent, ask that a Mr. Lyman be called out of turn?

The Court: Very well; you may proceed.

Mr. Durkin: Mr. Lyman, will you please take the stand?

(Testimony of Frederick N. Lyan)

FREDERICK J. DARBY, Resumed.

Cross-examination by Mr. Durkin

X Q 143. Mr. Darby, I think I overlooked one point that you might be able to answer for us. This container that this wheel or these wheels is or are placed in, as it is put into this kiln, I think I recall your saying that there was something on the bottom that opened and closed. A. No, I said that when the wheel is placed in the mold [194] before pressing, a bottom plate is in place and a top plate is put on top of the mold. But that mold does not follow it through to the baking, couldn't go in the kiln because the steel the mold is made of would melt.

X Q 144. As a matter of fact, there is nothing around the wheel, using the word, wheel, at this stage. A. After it is molded, you mean?

X Q 145. As it is in the kiln there is nothing around it at all. A. Only quartz.

X Q 146. Will you tell us why that is? A. Well, when a wheel is baked at a very high temperature, the kiln furniture that the wheel rests on is a ceramic material, sort of a fine clay; and if you put the grinding wheel right on top of the kiln furniture at the top heat, it would become part of the kiln furniture. So a bed—if you want to call it that—of quartz is on the surface of the kiln furniture

and the quartz is put all around the wheel so that it won't— You see, there are many wheels in each car and sometimes these wheels are packed one on top of the other in the car, two and three with quartz in between them.

X-Q 147. And actually the quartz has a higher— A. It is a separator.

[195] X-Q 148. Quartz has a higher resistance to heat than the clay or whatever that material is that is in there. A. It is like core sand that is in a foundry.

X-Q 149. After the wheel is taken— Did I understand you to say approximately 54 hours, 56 hours? A. 54 hours is the complete cycle for the kiln in which it is baked.

X-Q 150. At the end of that 56th hour— A. 54 hours.

X-Q 151. Sir? A. 54 hours.

X-Q 152. 54 hours; I am sorry. It is at that time that the regulated heat that is in effect in the kiln—it is almost off, if not off. Is that right? A. I would say the temperature of the wheel as it comes out might be between 100 and 200 degrees. It wouldn't be higher than that.

X-Q 153. Will you tell us as the wheel is taken out where it is put or placed then? A. It is then placed on a platform or a pallet.

X-Q 154. In what type of room? A. In the same department, the kiln department.

X-Q 155. What is the temperature of that room? A. Normal temperature.

[196] X-Q 156. Room temperature? A. Room temperature.

X-Q 157. How long is it left there? A. Well, the— You see, these wheels are coming out continuously and the wheels are removed from that room every morning. From one morning to the next there is an accumulation of wheels in that department, and the following morning they are taken to the finishing department for finishing.

X-Q 158. After that can you tell us where they are then taken? A. After the finishing department?

X-Q 159. Well, tell us, first, if you will, what occurs in the finishing department. A. Well, there again if there was anything the matter with the wheel, it would even be discovered before it gets to the inspection department because there are primarily three operations that the wheel goes through in finishing. The first operation is a leveling on both sides of the wheel which is done on a leveling machine which is similar to a rubbing bed, and the wheel is leveled to the required thickness, and also for flatness; and that is done on both sides. After that the wheel is graded.

X-Q 160. What do you mean by graded, sir? [197] A. Penetrated for grade of hardness to see if the wheel has come to the proper grade.

X-Q 161. And the proper grade is arrived at by whatever formula this wheel was made? A. A grade is arrived at by the two different steps. In other words, there are some 20 different grades of wheels.

X-Q 162. But the hardness, that is predetermined before you start your entire process. A. That is correct.

X-Q 163. In accordance with the formula that was to be complied with. A. That is correct. It is just an added precaution to check the grade of hardness, that is all, just one of our many inspection methods. You see, every wheel has a grain and a grade.

X-Q 164. Will you define or distinguish for us, please, the distinction between grade and grain? A. The grain is the size of the grit that we referred to this morning, and the grade is the definite hardness of the wheel. In other words, to give you an example of that, a Grade "G" would be a very soft wheel, whereas a Grade "S" would be a very hard wheel. Further along the alphabet, the harder

the wheel; and that is the standard set by practically every grinding wheel manufacturer [198] in the country.

X-Q 165. The hardness, of course, is the result of the mixture of the grain and the plasticizer. A. That is correct.

X-Q 166. As one fluctuates or one is higher and the plasticizer lower, then, of course, your corresponding hardness of wheel also occurs. Is that correct? A. That is true.

X-Q 167. What was the third step besides leveling and grading? A. Then the next operation is to put a bushing in the hole which is in the wheel. You see, the hole in the wheel has to have a bushing, which is a little bushing which is poured — In this particular instance it is a $\frac{3}{8}$ths bushing.

X-Q 168. Did you say poured? A. It is poured.

X-Q 169. Will you tell us how that is done? A. It is heated lead that is poured around the plug. The plug is set in the wheel and the hot lead is poured around there, and probably the width of that core or that lead would be about $\frac{1}{8}$th, even less than that. It is just a thin coating of lead to protect the arbor on the customer's machine so it won't scratch it.

[199] X-Q 170. Did I understand you to say then it is taken after this to the finishing room? A. That is the finishing room.

X-Q 171. That is the finishing room. A. There is one more operation in the finishing. Then the wheel is put on what is known as a facing machine.

X-Q 172. Will you tell us what that other operation is, please? A. The facing is truing of the grinding wheel. In other words, when you pour the lead in there, it is impossible to pour it so that the wheel would run absolutely true. So you then put it on a facing machine and dress it or true it on the face until it runs dead true.

X-Q 173. Are you actually truing the — A. The face of

the wheel, the outer diameter or the circumference, as you call it.

X-Q 174. Actually isn't there some truing done on the lead core too? A. Yes, there is a little trimming of the core sometimes so that there won't be any high spots for the flange to rest on, if that is what you mean. That is part of the bushing operation. We call it bushing.

X-Q 175. Tell us exactly what you do to determine the trueness of a wheel. A. Well, if the wheels in this case, of course, they are 7-inch diameter. There is a tolerance allowed in [200] diameter of 1 16th of an inch. That means that a wheel can be a 16th over or under, but it must run dead true; and we use that tolerance to make sure that the wheel does run true. If it doesn't run true, the wheel would be out of balance and you would get the same sensation, as you would remember in the old days when they had a flat on a trolley car? We set— The man that is truing that wheel would set his calipers to make sure he is correct on those wheels. After the facing or truing is done, then we go into the inspection method.

X-Q 176. The 1 16th tolerance, that is a margin of error? A. That is right.

X-Q 177. And that is in the diameter of the wheel—is that not right, sir?—the thickness of the wheel. A. That is the diameter. I might say this: That when we mold the wheel; a wheel 7-inch diameter is molded exactly 7.28, which is a little oversize, to allow for that truing.

X-Q 178. The reason that is done is because there is a shrinkage in the actual outside diameter of that wheel during your heating process. A. There might be a very slight shrinkage, but it is more to give us the extra material for making sure the wheel runs true and the customer gets his money's worth. If [201] he orders a 7-inch wheel he doesn't want to get a $6\frac{3}{4}$.

X-Q 179. After that I think you said you came to the— A. Inspection.

X-Q 180. Will you tell us how the wheel is inspected; and if there be more than one manner of inspecting it, will you tell us them in whatever order they be, sir? A. The first operation is to measure the wheel, make sure that the wheel is the right thickness. Understand, in leveling a man could possibly level the wheel until it was under 1 inch thick, so it has to be inspected and looked over by hand carefully by an inspector for measuring dimensions. While he is doing that he looks to see if there are any chips or anything on the wheel, anything that would cause the wheel to be thrown out for any reason. After that the wheel is put on a balancing machine to see if the wheel is in good balance.

X-Q 181. Explain or describe for us, if you will, this balancing machine. A. The balancing machine is a flat machine with an arbor in the middle which rides on ball bearings, and the wheel sets on there. And if the wheel is out of balance; in other words, if the wheel is heavier on one side than the other, there is an indicator to one [202] side of the balancing machine that has a small bubble and when that wheel is in perfect balance, that bubble—just like a level, a carpenter's level—that bubble would go to the very center of the dial. If it is out of balance, that bubble would go to one side, and the man then determines how much out of balance it is. And we hold that to a definite tolerance. If that wheel should be— For instance, the 7-inch wheel, if that wheel should be 3/8ths of an inch out of balance, it will not pass inspection because in running it would cause vibration.

X-Q 182. What you mean is if the inspector notices that it is 3/8ths of an inch out of balance, it will not go by. A. He has to balance every wheel and he can't miss.

X-Q 183. Why do you say he can't miss? A. Because the machine is there with the dial indicator.

X-Q 184. The mere fact that there is a dial there and there is a machine there— The dial actually shows the condition of the wheel. A. That is correct.

X-Q 185. And the visual observation by the tester determines to him whether or not that wheel goes through. Is that correct? A. Yes.

[203] X-Q 186. And, as a matter of fact, if the wheel or the machine wasn't looked at in a certain instance, the wheel could go by without it being known.

Mr. Reynolds: I object; argumentative, also speculative.

The Court: In all these cases, Mr. Reynolds, doesn't the human element enter into it?

Mr. Reynolds: I suppose—

The Witness: If it pleases the Court, I would like to explain about the balancing machine before the wheel goes on.

The Court: Mr. Reynolds can take it up with you in cross-examination. Go ahead.

X-Q 187. If you have anything you want to explain, go ahead.

Mr. Reynolds: I object to that. I think that is too broad. We decided on a question and answer at one time when I objected.

The Court: I think we will get along much faster. And if there is any matter the witness wants to explain when he gives an answer, he may do so. Witnesses have some rights as well as litigants here.

A. I think the question arose as to whether the human element could be at fault or the machine could be inaccurate. Is that the general idea?

[204] X-Q 188. No, sir; it is not. Assuming for the purposes of the question that the machine is as accurate as any mechanical instrument could possibly be— A. Yes.

X-Q 189. and determines that a wheel is not properly balanced, and assuming that that machine reflects that, is it not up to the inspector who examines and interprets that reading to determine whether or not that wheel is permitted to go on or whether it is excised from that particular line? A. The man who does the balancing is allowed a definite tolerance and nothing passes unless it is within that tolerance. And if it exceeds the tolerance, then the wheel is corrected. We have a means of correcting the balance.

X-Q 190. Mr. Darby, are you not, sir, assuming that the operator or inspector correctly interprets the reading on that machine?

Mr. Reynolds: I object to that, your Honor please. I think that is argumentative in the absence of any evidence to the contrary.

The Court: The witness has stated what happened in giving his conclusions. I think it is fair cross-examination. I will allow it.

[205] Mr. Durkin: Thank you, sir. May we have the question read, please?

(Question No. 190 read by reporter)

A. If he doesn't, he shouldn't be on the job.

X-Q 191. Yes, sir. If he does not do it, he shouldn't be on that job. Is that correct? A. That is correct.

X-Q 192. And if he doesn't do it and that wheel goes on, that wheel is out of balance when it passes him. Is that correct? A. Not necessarily.

The Court: Do you want that answer stricken?

Mr. Reynolds: No, your Honor. I didn't get a chance to speak; I am glad I didn't.

X-Q 193. I think you said there were some other types of tests aside from the— A. Balancing.

X-Q 194. Yes, sir. A. After the wheel is balanced, then the next operation is to put it on a testing machine.

X-Q 195. Will you describe that testing machine? A. The testing machine is an enclosure, of which we have many for all size wheels.

X-Q 196. May I ask you this, Mr. Darby: Is there any other procedure [206] applied to that wheel before this testing machine is utilized? A. Only to put it in balance.

X-Q 197. Tell us all about everything first before the testing machine is used. A. Well, the wheel is put in balance period.

X-Q 198. Then it is put on this testing machine? A. That is correct.

X-Q 199. And nothing else—theoretically nothing else is done to the wheel up to the time it goes on this testing machine. Is that correct? A. That is correct.

Mr. Reynolds: Isn't that a little ambiguous? May I have the last question and answer?

(Question No. 199 and Answer read by reporter)

A. (Continued) I assume you mean after it is balanced.

X-Q 200. We will assume after the wheel has been submitted to the balancing test. A. Right.

X-Q 201. And then it is put on this testing machine? A. That is right.

X-Q 202. First of all, Mr. Darby, will you tell us what the purpose is for putting this wheel on the testing machine? A. Well, according to the U. S. Department of Standards— [207] and they are adhered to by practically every grinding wheel manufacturer in the country, of which there are some 80—we follow the very same procedure, which is to test your wheel at anywhere from 1-1/2 to 1-3/4 times the speed at which the wheel will operate.

X-Q 203. You mean when it is put into actual practice? A. That is correct.

X-Q 204. And that test is a test for centrifugal force? A. That is correct.

X-Q 205. And that force takes into consideration periph-

eral force and lateral force? A. I would say pretty much. It would take up any stresses and strains that it is put to.

X-Q 206. Does it take into account the 7-inch grinding wheels that we have under discussion here? A. That is right.

X-Q 207. Are those wheels supposed to be used exclusively for peripheral use? A. They certainly are. They are not supposed to be used on the sides, if that is what you mean.

X-Q 208. That is one of the things I had in mind.

The Court: Never to be used on the sides?

The Witness: A 7 by 1 straight wheel ought never be used on the sides.

[208] X-Q 209. Do you ever put any such warning or anything like that on your labels, that it is not supposed to be used on the sides? A. Nobody does.

X-Q 210. My question is do you? A. No.

X-Q 211. Have you ever? A. No.

X-Q 212. Don't you think— A. It is common practice. Anyone knows that uses grinding wheels, or should know it.

X-Q 213. Knows what, sir? A. That it shouldn't be used on the side of the wheel.

X-Q 214. Why not? A. It is not safe to use it on the side of the wheel. It isn't designed to be used on the side of the wheel.

X-Q 215. Why? A. To begin with, the wheel has to have flanges on the side of the wheel as a support; and if the flanges are in proper place on the wheel, there is no room to grind on the side of the wheel.

X-Q 216. Do I understand your testimony, Mr. Darby, that the flange that fits on a grinding machine is the same or almost the same diameter as the wheel that it is flanging?

[209] A. Of course not.

X-Q 217. Maybe I misunderstood you. The reason that you say is if a machine or a wheel is properly flanged,

there isn't sufficient room on the side of that wheel for lateral use. A. It isn't designed for that use. That is all I can tell you.

Mr. Durkin: May I have the witness' previous answer read, please?

(Answer to Question No. 215 read by reporter)

The Witness: There is some room but there is not practical room for grinding.

X-Q 218. You were in error when you said that?

Mr. Reynolds: I object to that. My brother doesn't give the whole picture. He doesn't assume there are any guards on the wheel or not. You saw a machine here the other day. I think if he is going to say he is in error and get it on the record, he has got to talk about the whole picture.

The Court: The witness is correct in his testimony. He said if there weren't flanges on there, there would not be enough room to use it in a practical fashion.

The Witness: That is correct. The guards, too, [210] would be a deterrent from grinding on the sides, as well as the flanges. Furthermore, if I may say so, without a question the grinder I examined had a rest which was on the face of the wheel and not at the side.

X-Q 219. I have a pen. I imagine it is about 4½ inches in length and would you say approximately 1/8th of an inch in diameter? A. At least ¼.

X-Q 220. At least ¼? A. Yes; 3/8ths.

X-Q 221. Is it your testimony that when a machine has flanges on it and has a guard on it, if I had an instrument to be ground of this size I could not grind it? A. If you did, you would be assuming quite a risk. I wouldn't recommend it. If you want to know that, I wouldn't recommend it.

X-Q 222. Do you put anything on your labels to prohibit such use?

Mr. Reynolds: I object to that on the ground that is not being charged against us in this complaint. All we are being charged with in this complaint is the manufacture, not the failure to warn anybody of anything.

The Court: There is no claim made in this case the plaintiff in using this wheel was using it on a lateral surface rather than peripheral.

[211] Mr. Durkin: There is no claim by me.

The Witness: Mr. Durkin.

Mr. Durkin: Excuse me, Mr. Darby. There is no claim by me but it certainly was quite obvious from the cross-examination that there is an anticipated contention that that be the fact.

Mr. Reynolds: I don't quite understand my brother's theorizing. I won't say any more than that at this point. It is not embracing the complaint in the civil action in this clerk's office.

The Court: Let's see the complaint.

Mr. Durkin: I refer the Court to Paragraph 6 of the complaint.

Mr. Reynolds: That is what I refer to, too, your Honor; "manufacture, construction, production, inspection, and testing."

Mr. Durkin: If that doesn't come within one of those, I don't know where it would come in.

Mr. Reynolds: In my humble judgment it doesn't come in any place.

The Court: I will sustain the objection.

X-Q 223. You see that? (indicating machine) A. Yes, sir.

X-Q 224. Would you say that that wheel is properly flanged on [212] that machine?

Mr. Reynolds: I object to that. I don't think this man is called as an expert witness on the machines. He is testifying in his field, how you make emery wheels.

The Court: It would seem to the Court a man in the business as long as the witness has been in the production of emery wheels certainly would possess the requisite knowledge as to how they were to be used when placed on the grinders. I will allow the question.

X-Q 225. I don't want to mislead you; I am not asking you for an opinion whether or not these bolts are— A. Tight, you mean?

X-Q 226. —tight or not. I am just talking about the flange. A. Size of the flange?

X-Q 227. Size of the flange on that particular wheel. A. It looks pretty good to me.

X-Q 228. It looks quite well to you? A. Yes.

X-Q 229. You know, do you not, when you are manufacturing these wheels, the way flanges are placed on them for actual use? A. We know what they should have but we have no way of knowing whether the customer would use the proper flanges.

X-Q 230. Looking at this flange again, I think you said it looked pretty good. A. Yes.

[213] X-Q 231. By pretty good, you mean it conforms with what you would expect them to do? A. That is right. It is approximately—I would say without measuring it and from looking at it free eye,—I would say that the flange is approximately half the diamond of the wheel, which is pretty close.

X-Q 232. The test that we were on concerning the testing of centrifugal force, and so forth, I think you stated that when that test is performed, it takes into consideration peripheral and lateral force—is that correct?—when the test is performed. It is what you refer to or know as a spin test. Is that correct? A. That is correct.

X-Q 233. The spin test consists in rotating that wheel. A. At a given diameter and speed.

X-Q 234. At a given diameter and a given speed, which

speed is "X" amount of times more than the wheel is to be rotated in actual use. A. Correct.

X-Q 235. But when that test is given there is no force applied to the periphery of that wheel, is there? A. No.

X-Q 236. It is just free. A. Correct.

[214] X-Q 237. And the machine that it is placed on, of course, is geared for whatever r.p.m. you want. A. It has a variable speed so that you can start from zero and run it up to— We will say in that particular case it could go up to 12,000, 14,000 revolutions per minute. We hold it at any speed all the way. We get it up to the required testing speed and hold it there for probably a minute or two and then come down.

X-Q 238. Gradually? A. That is right.

X-Q 239. And back to zero? A. That is right.

X-Q 240. As a matter of fact, when you shut the current off or you take away the current from a testing apparatus or from this machine, these wheels continue to roll for some time after that, don't they? A. I don't think I followed your question.

X-Q 241. Assume that the current was on,— A. Yes.

X-Q 242. —and you had your wheels spinning, and so forth. When you take the current off, those wheels continue to spin after the current is off. Is that not so? A. Yes, yes.

X-Q 243. Tell us, Mr. Darby, what is the purpose of this spin test? [215] A. Well, I think I explained this morning that no one knows what happens inside of a kiln at 2400 degrees, so we want to make sure we are sending out a wheel that in our opinion is safe to use, a wheel we wouldn't hesitate to operate. We don't want to make a grinding wheel that is defective. We don't want to ship a grinding wheel that is defective. What is the object? There is no percentage in it. So that if a wheel has anything the matter with it, it should break in the testing

operation. When the wheel is tested at 6300 r.p.m. and recommended to run at 3600 r.p.m., we feel that that excessive speed will take care of anything that might be the matter with the wheel in case the facer dropped it.

X-Q 244. —which excessive speed is applied, as I recall, approximately two minutes? A. That is about right.

X-Q 245. Looking at the wheel that is on this machine again, is it not a fact, Mr. Darby, that if there be a defect closer to the core and further away from the periphery or a defect closer to the periphery and further away from the core, that both aren't ascertainable at the same time? A. It would— If it was cracked underneath the flange, you mean, in the hole?

X-Q 246. Yes. [216] A. That would sure let it go in testing the machine.

X-Q 247. Very fast? A. I don't know, how fast. We would have no way of knowing. Many wheels go up to the speed and then break on the way down if there is anything the matter with them.

X-Q 248. If the defect be closer to the periphery, it would take longer for a shattering than if the defect was taken closer to the core. A. I don't feel qualified to answer that; I don't really know.

X-Q 249. Mr. Darby, aren't you the one that is in charge of the methods and modes of testing? A. Yes, sir; I am.

X-Q 250. You are. And don't you take into consideration, sir, the fact that the defect in the wheel might lie in any section of that wheel? A. If there is a defect in the wheel, I repeat it would break in the testing.

X-Q 251. No matter if the defect— A. Regardless of where it is, Mr. Durkin.

X-Q 252. In a 2-minute test? A. Absolutely.

X-Q 253. Tell us what defects you look for, or your company— When I say you, Mr. Darby, I mean your company. Tell [217] us what you look for when you inspect

these wheels and when you submit them to this spin test. A. Well, possibly a minor chip on the corner of the wheel.

X-Q 254. Like this? (indicating) A. There is a little chip on that, isn't there?

X-Q 255. Yes, but that can be ascertained clinically, by just looking at it. A. And that could happen most anywhere.

X-Q 256. Surely, but this spin test that you are referring to— A. Would have nothing to do with that.

X-Q 257. Oh, no. And in addition to that it would be applied before this wheel ever left your premises. Isn't that correct? A. Not necessarily. You mean that chip—

X-Q 258. No, the spin test that you gave. A. The spin test before it leaves, yes.

X-Q 259. Aside from whatever chips or nicks, or whatever adjective we use, what else do you look for? A. Well, I have explained that we look for balance. I have explained that we look for accuracy of measurement. I have explained that we look for grade of hardness.

X-Q 260. As I understand it, Mr. Darby, the balance, and so forth, is ascertained by a balancing machine. Is that correct? A. Yes.

[218] X-Q 261. And the hardness, that is also ascertained before your spin test. Is that not correct? A. Well, unless I misunderstand you— I don't know what you are driving at—but after the wheel is removed from the testing machine, it is examined again. Is that what you mean?

X-Q 262. It is not what I mean.

The Court: Perhaps, Mr. Durkin, the witness doesn't understand the question.

The Witness: I am afraid I don't, sir.

Mr. Reynolds: Could I have the question?

(Question No. 261 and Answer and Question No. 262 read by reporter.)

The Court: There is apparently a misunderstanding

between counsel and the witness. Suppose you restate your question.

X-Q 263. Mr. Darby, the balancing test, that takes place before—if I might use the term—the spin test. A. That is correct.

X-Q 264. Is the examination or test to determine the hardness also performed before the spin test? A. That is correct.

X-Q 265. Is the examination or test to determine the trueness of this wheel or the wheels performed before the spin test? A. That is true.

[219] X-Q 266. The thickness or the 1.28, whatever it be, the thickness of the wheel, that margin of error included, is that also looked into before the spin test? A. That is right.

X-Q 267. Will you tell us what you look for when the wheel is exposed to the spin test? A. While it is being spun, you mean?

X-Q 268. While—or the purpose for the spin test. A. The purpose of the spin test is to see whether it will stand the speed.

X-Q 269. After all the other tests and if everything was proper throughout the entire mode of manufacture, there would be no question about that, would there? A. We can't—

Mr. Reynolds: I object. I think that is argumentative.

The Court: I think it is.

Mr. Durkin: I will withdraw it, sir.

The Court: Sustain the objection.

X-Q 270. The spin test then is to see whether or not the wheel will withstand the speed. Is that correct? A. That is right.

X-Q 271. Are 7 by 1 by 5/8 wheels manufactured by you and sent to Hoover all geared for an r.p.m of 3600? [220] A. That is correct.

X-Q 272. As a matter of fact, all your 7-inch wheels that you ship to Hoover are all geared with a 3600 r.p.m. on the wheel. A. No, just the 7-inch.

X-Q 273. 7-inch wheels. You have a 10-inch wheel, I think, that is geared for something in the 4,000's. A. No, the 10-inch wheel would run at a lower speed than the 7. The larger the wheel, the lower the speed.

X-Q 274. How is the 3600 placed on that wheel, your wheel? A. On every wheel there are two blotters or pads, as we call them, one on each side of the wheel, which very clearly identifies the name of the company where the wheel was made. The notation is put on there, "Use a guard. Read your safety code." The size of the wheel is stenciled on the pad, 7 by 1 by 5/8ths. The grain and the grade, which I referred to, are stenciled on the wheel.

X-Q 275. Either a 60 or a 40? A. That is correct. Then it either says, "Do not run over 3600 r.p.m.," or says, "Maximum operating speed, 3600 r.p.m.," which means the same thing.

X-Q 276. Is that all that is on the label? Not that it makes too much difference, but don't you have "Vitrified," —or [224] something like that on there too? A. No, because—I will tell you why. The grade clearly tells the type of wheel. For instance, in that particular type of wheel for Hoover it says, "M. 5 V." and "V" stands for vitrified.

X-Q 277. When you say the label has 3600 r.p.m. on it, would a 3600-r.p.m. wheel be an appropriate wheel to be affixed to a bench grinder whose r.p.m. on the spindle was less than 3600?

Mr. Reynolds: I object to that unless there is some qualification of the witness on that point. I don't think that is a proper question under the circumstances.

The Court: It seems to the Court here is a man whose

business it is to make emery wheels for use in industry. If he can't answer the question, he may say so.

A. I see no objection to the question. That machine itself is marked 3400, and we recommend the wheel to operate at 3600, which is over the speed allowed. Incidentally it is tested at 6300.

X-Q 278. The wheel is tested? A. Yes.

X-Q 279. In other words, in addition to the permitted r.p.m. of 3600, you take into consideration a margin of error. [222] A. That is right.

X-Q 280. Can you tell us what is the usual margin of error on a wheel?

Mr. Reynolds: He anticipates a margin of error and now he wants him to tell us what the margin of error is.

The Court: I will sustain it.

Mr. Reynolds: I move to strike out the previous answer, that part which says, "margin of error."

The Court: I think you are a little late.

Mr. Reynolds: Better late than never.

Mr. Durkin: I will consent.

The Court: Very well; that part of the answer referring to "margin of error" may be stricken.

Mr. Foreman, ladies and gentlemen of the jury, whenever the Court grants a motion to strike an answer from the record, that means that particular answer is no longer evidence in the case and you must disregard it as though it were never given.

X-Q 281. The spin test, Mr. Darby,—can you tell us what occurs to your wheel after the spin test? A. The inspector puts his identification on the wheel so that at any time a wheel comes back to us we have means of determining who inspected the wheel.

[223] X-Q 282. You mean if the identifying feature is still on the wheel when it comes back to you. A. That is correct.

X-Q 283. If it isn't, then, of course, you have no way of knowing.

Mr. Reynolds: I object to that. That is argumentative also.

The Witness: I will try to be slower in my answers, your Honor.

The Court: Suppose you do. I will sustain the objection. It is subject to a certain proposition anyway.

X-Q 284. Is there any other test that this wheel in your particular process is subjected to after the spin test, Mr. Darby? A. No, I don't think so except that the man takes the wheel off the testing machine, looks it over, and puts his stamp on it. He records the testing of that wheel on a testing sheet, a copy of which I have. Every inspector keeps a record of every wheel he tests, and with the numbers for identification purposes, and those are notarized each day; he has tested the wheels.

X-Q 285. You say notarized. You mean noted on the sheet you are referring to? A. He appears before me every morning and swears to it that [224] he has tested those wheels.

X-Q 286. I didn't follow one thing. Is there a number on each of these wheels, each of the wheels you manufacture? A. That is correct; the batch number which follows them right through.

X-Q 287. Each individual wheel, does that have a number on it? A. Only the part number of the grinder. For instance, Hoover Company on their wheels have a part number. That is the only number that will appear on their wheel. The batch number under which they are made doesn't go on the wheel that goes out to the user.

X-Q 288. If you shipped Batch A to Hoover, it would have that number, referring to Hoover—you know, that "5," whatever it is. A. 5139-B, whatever it is. Yes, I

forgot to mention that when you asked what was on the pad. That is on there too.

X-Q 289. If Batch B went down to Hoover and was intermingled with Batch A, you couldn't tell by looking at the wheel which of the two batches it came from, could you? A. I think you misunderstood my reply on that. The number that appears on the pad is a part number which indicates that that wheel is to go on that particular grinder. And they may buy 500 wheels this month with that number, and two months from now they might buy 500 more and they [225] will have the same part number to make sure they go on there. But it is not "A," "B," "C," and "D"; it is just a part number.

X-Q 290. And if both those batches were at Hoover at the same time in Hoover's stock, you couldn't tell by pulling one wheel out whether or not it came from Batch A or Batch B by looking at that wheel, could you? A. No.

X-Q 291. You mentioned in explaining that to us that the number that was placed on— You knew, or did you know the type of grinder that those wheels were to go on?

Mr. Reynolds: I object now: "those wheels." What do we mean by "those wheels" in this question?

The Court: It strikes me, Mr. Durkin, that is a little ambiguous. When you say those wheels, do you mean wheels of a certain size, or just what do you mean?

X-Q 292. Mr. Darby, I am only referring again to the 7-inch grinding wheel that you submitted and supplied the Hoover Company, and only that type of wheel. You knew when you supplied Hoover with that type of wheel what type of machine it was to go on. A. Put it this way: From the size of the wheel we are reasonably sure that it goes on a bench grinder. When we sell them the 10-inch wheel, we know it doesn't go [226] on a bench grinder; that goes on what is known as a floor stand. And beginning at 10 inches—it is much more appropriate to grind a

shovel with a 10-inch wheel or larger, if I may say so:

Mr. Durkin: I think that is a gratuitous remark and I ask it be stricken.

The Court: That part of the answer beginning with "much more appropriate" may be stricken.

X-Q 293. Did you ever discuss with anyone the fact that a 7-inch wheel was being used by a shovel?

Mr. Reynolds: Wait a minute.

A. I simply heard it in the courtroom, Mr. Durkin; that is all.

X-Q 294. Can you tell us in what type of container the wheels are sent from your company to Hoover? A. Yes, sir.

X-Q 295. Will you tell us? A. They are sent in barrels.

X-Q 296. In that barrel there is sawdust or some type— A. Sawdust and shavings.

X-Q 297. In and around the wheels, and so forth? A. In between, on top of the wheels, and on the side of the wheels.

X-Q 298. Have you ever visited the Hoover plant? [227] A. I haven't personally, no.

X-Q 299. But that plant is visited by a member of your staff, is it not? A. It has been.

X-Q 300. Is there ever any question of gases in the manufacture of a vitrified wheel, Mr. Darby? A. Gases?

X-Q 301. Yes. A. Well, I wouldn't know of any. There might be. I don't know.

X-Q 302. Is there any type of gas emitted from the application of— A. You mean the baking or something?

X-Q 303. Yes. A. Well, I will say this: They are fired in an oil-fired kiln. And if gases do arise from an oil-fired kiln, then I presume there are gases there, but I have never noticed any from the odor or anything.

X-Q 304. Have you ever looked for them in your wheels? A. Gas in a wheel?

X-Q 305. Yes. A. No, I don't think we have.

[256] ROBERT MORTON, Sworn.

Direct Examination by Mr. Durkin.

Q 1. Mr. Morton, by whom are you employed, sir? A. I am presently employed by Kingston Conley, Incorporated.

Q 2. In 1952 by whom were you employed? A. The Hoover Company.

Q 3. As a practical matter can you tell us if there is any association between the Hoover Company and the—what was it?—Kingston Conley Division? A. Yes, sir.

Mr. Reynolds: I object to that at this point until this witness gives his qualifications to testify. All we know is he was employed by Kingston Conley Company.

Mr. Durkin: He is employed by Kingston Conley Company.

[257] Mr. Reynolds: We don't know whether he is an officer, manager, clerk. We ought to find out how he would be in a position to know this.

The Court: Ask him what his official capacity is.

Q 4. At the present time, Mr. Morton, what is your official capacity? A. At the present time I am plant superintendent.

The Court: Plant superintendent?

The Witness: That is correct.

Q 5. In 1952 what was your title, sir? A. In 1952 I was chief inspector.

Q 6. And for whom, sir? A. In 1952 it would be for the Hoover Company.

Q 7. And after 1952 there was some type of a merger or something? A. There has been a sale since then.

Q 8. Now in 1952, Mr. Morton, can you tell us whether or not you are familiar with the source or sources of supplies of emery grinding wheels that were received at your particular plant? A. I am.

Q 9. Can you tell us in 1952 whether or not you received

any emery grinding wheel— Tell us from whom you received your emery grinding wheels in 1952.

Mr. Reynolds: I object until some testimony is [258] given as to what his duties were in that connection.

The Court: I think that would be preferable—

Mr. Durkin: I will be glad to, sir.

The Court: —to show what his duties were.

Q 10. You say in 1952 you were chief tester. Is that correct? A. Chief inspector.

Q 11. And your duties as chief inspector, what did they entail? A. Well, they covered everything from checking materials on receiving inspection to inspection throughout the plant of all the operations that went on, to the actual testing of the final product before it left the plant.

Q 12. Can you tell us from what source or sources you received your 7-inch emery grinding wheels in 1952?

Mr. Reynolds: I don't like to labor the point but he didn't reply, in answer to what his duties were, that he had anything to do with the receiving of emery wheels.

Mr. Durkin: I think he said it was one of his duties to inspect the products as they were received.

Mr. Reynolds: Final product.

The Court: Suppose you ask him the categorical question, what he had to do, if anything, with the receipt of supplies and purchases.

Q 13. Did you have anything to do with the receipt of emery [259] grinding wheels in 1952? A. Yes, any material that would come into the plant was under my jurisdiction.

The Court: Any material that came into the plant?

The Witness: That is correct.

A. (Continued) They were given sample tests, and everything was checked over against sample tables as to whether or not they should be received or not or sent back to the vendor.

The Court: You were in charge of that?

The Witness: That is correct.

Q 14. Can you tell us in 1952 from whom you received your supply or supplies of emery grinding wheels, 7-inch? A. At that time we had two suppliers.

Q 15. Can you tell us the names of those two suppliers. A. One was Universal Abrasive from Chicago and the other was American Emery.

Q 16. The other was who, sir? A. American Emery.

Q 17. By American Emery do you mean—

Mr. Reynolds: I object to what he means. It is a leading question of the witness.

The Court: That is leading.

Mr. Durkin: I withdraw it.

[260] Q 18. In 1952 you had two sources of supply of 7-inch emery grinding wheels. A. That is correct.

Q 19. And only two? A. That is correct.

Q 20. Now, say, 1951 or 1950, were there any other sources in those two years? A. There were not.

Q 21. Of those two sources can you tell us whether either or both of those sources supplied a wheel with a blue and white label on it?

Mr. Reynolds: I object to that. That is leading also. This witness ought to be required to testify what the blotters were, if he knows.

The Court: I suppose the proper way would be to ask him what he knows about the labels on the wheels supplied.

Q 22. First, describe the label of The American Emery Wheel Works of Providence, Rhode Island. A. At that time it was a white label, to the best of my knowledge; had "American" written across the top. I believe it had a blue circle around the outside of the blotter about 1/8th inch from the edge, and there was some other incidental writing, such as the actual stock [261] number that we had —our company. Also, "3600 r.p.m.," was written on it. That coincided with something that we put on the front

which specified— The actual metal tag that we have on the front of the grinder specifies that you should not have a wheel less than 3600 r.p.m.

Q 23. Do I understand that the label that you have just described was a white background with blue on it? A. That is correct.

Q 24. Was there any other color, to your knowledge, aside from the white background and blue? A. Just blue and white, as I recall it.

Q 25. Did you have any other company's wheels in your factory at that time during the entire year of 1952 that had a label on it with the colors of blue and white? A. No, sir.

Q 26. Mr. Morton, can there be any doubt about that answer at all?

Mr. Reynolds: I object to that. That is just like saying, "I am saying three times that that is so."

The Court: I will sustain the objection technically.

Q 27. I show you a wheel with a label on it and ask you if you can identify that label? [262] A. That is the other supplier.

Q 28. That is the label of the Universal? A. I have seen some that was like that. That is correct.

Q 29. Can you tell us, Mr. Morton, whether or not there was on any other label other than the label of The American Emery Wheel Works at Providence, Rhode Island, a notation concerning an r.p.m. rate? A. I don't recall any.

Q 30. Can you tell us whether or not at your plant in 1952 you ever received any other type of wheels from the Universal Wheel and Abrasive Company or Corporation of Chicago, Illinois, with a different colored label other than the one I am showing you? A. Yes, we did.

Q 31. That other type of label from the Universal Company in Chicago, that was different in color than the one that I am showing you now? A. That is correct.

Q 32. Did that label have any blue in it? A. None at all.

Q 33. There is no doubt? A. No doubt.

Q 34. The other label that was on the Universal wheel that was supplied to your company in 1952, tell us what color was it? [263] A. It was a completely white blotter.

Q 35. Excuse me? A. Completely white blotter similar to the size which you have there, and it had—well, you might call them printed or typewritten black figures on it.

Q 36. Those black figures, can you tell us whether or not that was the grit notation in the wheel? A. In some cases it was the grit notation. Since we have two, it was a 40 or 60. In other cases there were some numbers. Made no sense to us at all. It might have been their numbers, serial numbers.

Q 37. At any time during the year 1952, as far as your own personal knowledge is concerned, did your company ever receive a label from the Universal Company at Chicago, Illinois, with an r.p.m. notation contained thereon?

Mr. Reynolds: I object to that unless he says that there would be no possibility of anybody else in the company knowing something that he didn't know. In other words, this question, as it is framed, is intended to answer completely for the company.

Mr. Durkin: I think I incorporated in that question as far as this particular man goes.

The Court: Your question included that. It is understood, of course, Mr. Witness, it is of your own [264] personal knowledge.

The Witness: Yes, it is.

Q 38. Did you at any time during the year 1952 as the chief tester for the Hoover Company ever see on a label, which label came on a Universal wheel, and a label other than the one I am showing you now,—did you ever see at any time an r.p.m. notation on that wheel?

Mr. Reynolds: I object, your Honor, to "that wheel."

Again the record will seem to indicate we are talking about the wheel Whit Mason was involved in, and we are not.

The Court: I think the question is designed to mean on any wheel received from Universal Abrasive.

Mr. Durkin: At any time during the year 1952.

A. Not as such, not as r.p.m. figures. As I said, there were figures on the wheel and there were none that said specifically so many r.p.m.

Q 39. Did you ever see the notation, "r.p.m.," on any of those labels? A. I did not.

Q 40. This other wheel supplied to your company in 1952 by the Universal Company of Chicago, Illinois, which, I think, you said was completely white— A. That is correct. [265] Q 41. —and which did not have any r.p.m notation on it.— Is that correct? A. That is correct.

Q 42. —can you tell us whether or not there was any writing, script or printing of any type or nature, on that particular label?

Mr. Reynolds: I object. If I understood the witness' previous testimony, he said the printing was in black on the white label of the Universal.

Mr. Durkin: There is no dispute. I agree.

Mr. Reynolds: This question is immaterial. It has already been answered.

Mr. Durkin: This isn't talking about numerical notations; it is talking about script, printing or writing.

Mr. Reynolds: He has already testified there was black printing on the Universal white label.

Mr. Durkin: He testified there was black numbering, which numbers meant nothing to his corporation.

Mr. Reynolds: Printing, I am reasonably sure.

The Court: I will allow the question. Let's clarify the situation. Go ahead.

Q 43. Mr. Morton, when you said before or mentioned before about the blackness on this white label, aside from

what you said before, was that blackness on that white label [266] numbers or was it writing? A. I should have specified they were numbers, not writing.

Q 44. Those numbers, I think you said, meant nothing to your particular corporation. A. Most of them did not. The 40 and 60 did mean something to us, but some of the others meant nothing.

Q 45. The 40 and 60, as I understand, is the grit compound in the particular wheel. A. That is correct.

Q 46. Aside from the black numbers that were on this white label—and when I say label, I am talking about any wheel, any label at your factory in the year 1952 for wheels supplied by the Universal Company, Chicago, Illinois,—was there any writing, printing, or script of any sort, of any nature, on that label? A. On the white label?

Q 47. Yes, sir. A. No.

Q 48. Can you tell us, Mr. Morton, are you familiar with the manner in which your company receives emery grinding wheels from The American Emery Wheel Works of Providence, Rhode Island? A. Yes, I am.

Q 49. Can you tell us how they are received?

[267] The Court: Now are you talking about the present or 1952?

Mr. Durkin: Only in 1952, sir.

Q 50. Let me ask you, first, is there a distinction now between the way it was in 1952? A. To the best of my knowledge, I think it is the same way as it was then.

Q 51. In 1952 then—we will be specific to that year—can you tell us whether or not you are familiar with the way the wheels were received at your corporation at that time? A. I am; yes, sir.

Q 52. Tell us in what manner they were received. A. They are received in barrels approximately 3½ feet high, about 3 or 3½ feet high, and they are packed in sawdust, approximately— well, depending on the size of the wheel, but

approximately 30 wheels to a barrel, something in that neighborhood.

Q 53. Tell us what occurs or what did occur at your plant as a general practice in the year 1952 when these wheels were received from this corporation in Providence. A. Well, the wheels upon receipt are unloaded from the barrel and they are given a visual inspection by the receiving inspector. By visual I mean strictly looking [268] for cracks, chips, defects, any blemishes, labels that might be misplaced or anything else— the blotter that might be misplaced. And after that they are stacked in storage bins in our receiving and storage area, completely—well, I say completely out of the way in aisles. And even as far as transporting goes to assembly, they are put—from the stores area they are put in boxes, not stacked loosely on dollies or anything else. They are put in boxes and then delivered to assembly where they are then picked out and put on the grinder.

Q 54. During the year 1952 can you tell us whether or not you manufactured a ½-horsepower bench grinder similar or identical to the one I am showing you here? A. That is correct; we did.

Q 55. On the one that I am showing you it has notations of Millers Falls Tools. Can you tell us, if you know of your own knowledge, on the machines that you manufactured in 1952—can you tell us in what course or in what part of the procedure this particular plate became affixed to this type machine?

Mr. Reynolds: I object to that because it doesn't identify what plate he is talking about or what is on the plate. I don't think it means much of anything.

The Court: I thought counsel had said the Millers [269] Falls plate.

Q 56. I am referring, Mr. Morton, and I am pointing to a plate that is on the motor aspect of this particular grinder,

at the top of which it says, "Millers Falls Tools, Ball Bearing, A. C. Motor;" then gives numbers, notations underneath it; that specific plate, that type of plate, I should say, on this type of machine. Can you tell us where, in what part of the procedure of manufacture, that plate is put on? A. Yes, that plate is put on as a subassembly operation. The black enameled band, as such, that you see around that is merely protection for the electrical setup underneath, and that name plate is riveted to that band as a subassembly operation prior to assembly of the whole unit.

Q 57. Is that done at your plant? A. That is correct.

Q 58. In other words, before this type machine leaves your plant, the name, Millers Falls, this name plate, is already affixed to it. Is that correct? A. That is correct.

Q 59. If you will, Mr. Morton, will you step down a second, please? There are other notations on here, a notation of r.p.m. Can you tell us why that is on there?

(Witness descends from witness chair)

[270] A. Well, yes. The r.p.m. will tell the person, whoever is using it, how many revolutions this unit will turn over at.

Q 60. Is this machine prepared to receive a wheel that has an r.p.m. notation or suitability of 3600 r.p.m.'s? A. That is correct.

Q 61. Is it possible— Well, of course, I mean under ordinary circumstances, and so forth, when this machine is plugged into an electrical current, and so forth, for this machine to go 3600 r.p.m.'s? A. Is it possible for it to go 36?

Mr. Reynolds: I object to that; "this machine" business again, your Honor. There is no claim— No proof has been made that this machine we are looking at today is the machine that Mr. Mason was working on. I think it ought to appear in the record.

Q 62. Take a look at this plate, Mr. Morton, and tell us, if you can, when that machine was manufactured by your

plant. A. It was March—we have a date code on here—March, 1952.

Q 63. March of 1952. Now I think you can sit down again, if you would like. (Witness resumes witness chair) This machine that I put before you with the Millers Falls [271] notation on it, and so forth, was manufactured at your company in 1952. Is that correct? A. That is correct.

Q 64. Assume, Mr. Morton, that the machine itself—What is the proper word for this grinder? A. Bench grinder.

Q 65. Bench grinder. Assume that the bench grinder is completely assembled. Can you tell us whether or not that machine, the machine itself, is inspected by anyone at your company at that time or any time thereafter? A. Yes, absolutely.

Q 66. Is there anything on here at all that will show us or indicate that it was inspected? A. Yes, there could be stickers on it. I don't know whether they are left on there now, but the inspector who does the testing puts a sticker of some sort with his initials on it.

Q 67. Will you take a look at this, Mr. Morton, and tell us what that notation is on the back part of that motor? A. "Mechanical test by D.I.C."

Q 68. Do you know who D.I.C. is? A. Yes, Daniel Campbell.

Q 69. Are there any other types of tests put on or applied to this particular machine before it is shipped out to [272] Millers Falls, of course? A. Once it is assembled, it is given a complete electrical and mechanical test. It is run. It is checked for electrical deficiencies; for an open winding, a grounded winding, or a shorted winding. It is checked to be sure it is all right electrically and it is also checked to see it is all right mechanically for bearing noise, r.p.m., and so forth.

Q 70. What you have just testified to, Mr. Morton, is that

done before or after the wheels are placed on the machine? A. It is done after the wheels are placed. It is completed just prior to going into the shipping room.

Q 71. Is there any test applied to the machine before the wheels are put on it? A. Only a ground check.

Q 72. Just a ground check? A. Ground check test to see that the winding is done properly.

Q 73. I show you the right guard or the guard on the outside of the right emery wheel and ask you to look at the inside side of it, and ask you whether or not you recognize the notation on that particular piece of paper. A. Yes.

Q 74. Can you tell us what that is? A. "Mechanical test by H.E.E."

[273] Q 75. Who is H.E.E.? A. Harry Eastland, also a tester.

Q 76. He was also a tester? A. That is correct.

Q 77. Was he a tester in 1952, to your knowledge? A. Yes, he was.

Q 78. Do you know, Mr. Morton, whether or not any representatives of The American Emery Wheel Works of Providence, Rhode Island, ever come down to your plant?

Mr. Reynolds: I object to that, your Honor please, unless we find out the names of persons, or so on and so forth.

The Court: I assume this is a preliminary question. What is the materiality?

Mr. Durkin: I want to show the familiarity with the finished product by this corporation, for the wheel that is going on it. It has been testified to yesterday by Mr. Darby that representatives of his company go down.

The Court: I will allow the question.

Mr. Durkin: Thank you, sir. May we have the question read, please?

(Question No. 78 read by reporter)

A. Specifically I don't recall that I myself have talked to them, but I would assume that there are representatives

[274] come through as salesmen and they are in daily in purchasing.

Mr. Durkin: Then I will move to strike that answer.

The Court: The answer may be stricken.

Q 79. You don't know of your own knowledge whether or not anyone from American Emery Wheel comes down? A. I could not say that I have such knowledge.

Mr. Durkin: I ask that that answer be stricken then.

Q 80. Looking at this particular machine that we have in front of you, Mr. Morton,— By the way, how long have you been associated with the making and manufacturing of these type machines? A. 16 years.

Q 81. Do I understand that this is called a guard, these two pieces? A. The one in your right hand is a guard cover.

Q 82. And that is— A. That is the guard.

Q 83. —the guard? A. That is correct.

Q 84. This particular piece of metal, what do you call that? A. That is in our terminology a tool rest.

[275] Q 85. Its function is for tools to be rested upon as they are being used. A. That is correct.

Q 86. I direct your attention specifically to this particular plane and ask you whether or not that particular plane is used for the pgripheral aspect of that wheel.

Mr. Reynolds: I object to that, your Honor please. I think the witness ought to be asked what it is used for. Let him describe it.

Mr. Durkin: Just in the interest of time.

Q 87. Tell us what the front part of this is used for. A. The front part is used to rest whatever you are grinding on against the wheel to get an accurate edge.

Q 88. What do you mean by against the wheel? A. If you were grinding a chisel or some such item, you would rest it on the—if I may show you here. You would hold it on here and grind against this surface rather than without it trying to just hold and slide around and not

get an accurate edge. You would use that surface to get an accurate edge.

Q 89. While you are down, Mr. Morton, (Witness having descended from witness chair) will you tell us what this particular plane is or that plane extending to the outside of the wheel as it is flanged on this machine? [276] A. The identical thing, only for use on the side.

Q 90. This particular aspect is used for the rest of tools—— A. Any item you want to grind.

Q 91. On the side of the machine. A. Correct.

Q 92. On the side of the wheel. A. That is correct.

Q 93. No doubt about that. A. That is correct.

Q 94. And the same, as I view it, occurs on the other side. A. That is right.

Q 95. With the rest for the side there is, of course, approximately— Well, what would you say the surface is from the edge of that flange to the edge of this wheel? A. Around a 7-3/4.

Q 96. And is that the area on the wheel that is to be used when the instrument is placed on the side?

Mr. Reynolds: I object again.

The Court: It is leading.

Q 97. Tell us what area of the wheel is used when an instrument is placed on the side. A. You would only be able to use the surface that is not covered by the actual metal flange that you see there.

Q 98. Pick us up, Mr. Morton, if you will, at the point where [277] this machine is fully assembled. Let me ask you before I say that: When this machine goes out of your company in Plainfield, New Jersey, or any machine it is like, can you tell us whether or not there are emery grinding wheels on it at that time? A. On this particular type machine there are.

Q 99. Is there any time this machine, this type of machine,

ever goes out of your factory without emery grinding wheels on it?

Mr. Reynolds: May I have the question read?

(Question No. 99 read by reporter)

Mr. Durkin: Will you answer it?

A. This, as such, is our standard half horsepower bench grinder and it does not go out without grinding wheels to anyone.

Q 100. To this particular manufacturer— I am sorry. What would they be,—distributor—Millers Falls? A. That is right.

Q 101. They would be a distributor. A. Yes.

Q 102. When you put their name plate and do their work do you have any knowledge as to what occurs to these machines after they leave your particular premise? A. Only— Not direct knowledge other than the fact that [378] they go to them for distribution; and as to actually what they do with them, how long they keep them, and so forth, I couldn't say.

Q 103. Do you know of your own knowledge, based upon the relationship between Millers Falls and your company, whether or not, before this unit can be used after it leaves your factory, there is anything else that has to be done to that unit? A. No, that unit is complete when it leaves our plant.

Q 104. And ready for use at any time? A. Absolutely.

Q 105. Can you tell us in 1952 the type of wheels that were on a Millers Falls grinding machine?

Mr. Reynolds: I object to that unless there is some preliminary testimony as to the method, if any, used by the Hoover Company to keep track of what wheels they use belonging to Universal and what wheels they use belonging to American Emery Wheel.

Mr. Durkin: I will take Mr. Reynolds' suggestion and ask one or two questions.

Q 106. Is it a fact, Mr. Morton, that actually your company manufactures this type of grinder and while it is at your company you affix the name or more than one company on it before it leaves your plant? Is that not right? [279] A. That is correct.

Q 107. And do you have as a practice any type of wheels that go on any type of machines? A. As a hard and fast rule, no.

Q 108. As a rule of practice? A. As a rule of practice we have certain—

Mr. Reynolds: I object to a rule of practice, your Honor. He says there is no hard and fast rule as to what wheels go on what machines. I object to this rule of practice under those circumstances.

The Court: Aren't we getting into something that is conceivably very speculative or conjectural, Mr. Durkin?

Mr. Durkin: I didn't think we were, sir; but if there be any doubt about it, I will withdraw it.

The Court: I think you had better.

Mr. Durkin: All right, sir.

Q 109. When this machine is completely assembled, referring you to 1952, before this machine leaves your premise, can you describe the type of packing or the manner in which it is prepared for shipment? A. I am not positive of 1952. I have a recollection— I don't believe our packing has changed since then, but basically it amounts to a cardboard or corrugated container [280] that they would go in, with the possibility of a wooden base, the unit bolted onto a wooden base. That is as far as I can recall.

Q 110. But the sides and top of it were of what nature? A. The sides and top were corrugated.

Q 111. No doubt about that. A. That is right; that is correct.

Q 112. Can you tell us— Just tell us in your own words when this machine was put into this type of container,

what was done to the machine and what was done to the container? A. The packing?

Q 113. If anything. A. If it were put in the corrugated container and when it were put in the corrugated container, there would be what we would call shooks or supports. They would be put in there for support. And again— I am a little hazy on it. They have been wood and they have been corrugated. At the present time we are using corrugated. And they are put in there. Instead of just a uni , as you see it, in a plain box where it can rattle around, they are put over the end bells to secure it from any mishandling in transit.

Q 114. Am I pointing to what you are referring to as one of the end bells? [281] A. No. If it was in a straight carton, such as this, there would be something put down over here which would secure it this way, which would be forced against the lid on top and keep it from tipping.

Q 115. Can you tell us whether or not there was anything else put in the box at all? A. Basically, outside of instruction tags as to how to hook it up, and possibly one or two small pieces, a bolt or another, or something—some small accessory, that would be it.

Q 116. The outside container, whatever it be, of this corrugated cardboard nature, can you tell us whose name, if there be any name, appeared on the external surface of this container? A. The name that would be on the outside would be strictly what is on the name plate, Millers Falls, if it were this—

Q 117. I should say if it was a Millers Falls machine inside. A. If it were other customers who we have, it would be their name. Our name would not show.

Q 118. Your name did not appear on the outside at all? A. That is correct.

Q 119. You say this machine was manufactured in March of 1952? A. Yes.

Q 120. Can you tell us— Well, as a matter of fact, I requested [282] you to check when this machine was shipped from your company to Millers Falls. Is that not correct? A. I believe, yes.

Q 121. Do you recall approximately when that was?

Mr. Reynolds: I object to that. This witness is going to testify as to what some other person told him. I object to that.

The Court: Isn't that so?

Mr. Durkin: If it be so, there is a great possibility it would be an exception to hearsay. I will ask him first.

Q 122. Did you have someone else or did you check any records, or how did you find out when it was shipped out? A. I believe I checked through Sales.

Q 123. When you say Sales, did you ask someone or did you look at a document or something? A. I asked Sales to check the shipping date.

Q 124. I won't ask you then when it was shipped out, but you did say it was manufactured in 1952, in March of 1952. A. That is correct.

Q 125. And you can tell that from the— A. There is an "L.C." on there. The first digit— The first letter is the year and the second is the month.

Q 126. You came up here voluntarily at my request. I didn't [283] subpoena you, did I? A. That is correct.

* * * *

[339] CHARLES W. PARSONS, Sworn.

Direct examination by Mr. Durkin.

Q 1. Mr. Parsons, can you tell us, sir, by whom you are employed? A. Millers Falls Company.

Q 2. Where are they located? A. Greenfield, Massachusetts.

Q 3. How long have you been employed by them? A. 45 years.

Q 4. Presently what is your position? A. I am purchasing agent.

Q 5. In the year 1952 can you tell us what your position was with the company at that time? A. I was purchasing agent then. I have been since 1932.

Q 6. And in addition to the job of purchasing agent in 1952 did you have any other job? [340] A. I did have charge of the shipping room up to a certain period, but when it stopped I don't recall. It was about that time but I don't want to set an exact date.

Q 7. That was about the time you had the new procedure, and so forth? A. Yes.

Q 8. And that was about 1953, wasn't it? A. About that, yes.

Q 9. Does your corporation or company manufacture grinding machines, Mr. Parsons? A. Not of this type.

Q 10. Do they manufacture any types of grinding machines? A. We make a portable electric type like used in garages or to carry around, but not this kind of a grinder.

Q 11. When you say this kind of a grinder, did your company manufacture any type of bench grinders? A. Never.

Q 12. Did you have any bench grinders made for your company during the year 1952 and prior thereto? A. Yes, we had.

Q 13. Can you tell us who manufactured them for you? A. The Hoover Company or Kingston Conley Corporation.

Q 14. Can you tell us whether or not the name plate that appears on the machine—the bench grinders—can you tell us whether or not that was put on by your company or by the [341] Hoover Company? A. It was put on by the Hoover Company.

Q 15. The machines— Or, first of all, can you tell us what appearance there was to these machines when they were received at your stockroom from the Hoover Com-

pany? A. They were received in either wood cases or specially made cartons for reinforcing the grinder so it wouldn't get damaged.

Q 16. When you received those grinders in those types of cartons or cases that you have just described, can you tell us whether or not your name, the company's name, was on the carton at that time? A. Yes, it was stenciled on.

Q 17. Stenciled. A. And a little name plate, a tag, put on.

Q 18. It was on before it was received by your company? A. That is right.

Q 19. At any time, Mr. Parsons, especially during the year 1952, did you—did your company at any time ever take any of those machines that were made by the Hoover Company in New Jersey out of the containers that they were in when they were received by your company? A. To my knowledge, no.

Q 20. Can you tell us whether or not, sir,— First, tell us, [342] after they were received by you, were they stored by you? A. They were.

Q 21. And how long were they stored? I mean until what was accomplished? A. Of course, that would depend on how fast they sold.

Q 22. You kept them until they were sold. A. Until we had a sale for them.

Q 23. When they were sold they would be shipped to whoever the purchaser was. A. Whatever concern we sold them to.

Q 24. Can you tell us, Mr. Parsons, whether or not when this package left your premise, after it was received from Hoover, it was in the same container and in the same condition as it was when it was received? A. Identical.

Q 25. All the years that you have been with this company and all the years that you have been doing business with the Hoover Company, can you recall one instance when a wheel, an emery wheel, was taken off a machine received

from the Hoover Company and your company put another wheel on? A. Not to my knowledge; no, sir.

Q 26. You, I think, said you manufacture portable grinders. A. Yes.

Q 27. On those portable grinders can you tell us whether or not [343] there are any emery wheels attached? A. There are.

Q 28. Can you tell us the manufacturer of those emery wheels? A. Well, as I recollect, it is made by the Manhattan Rubber Emery Wheel Company of New York. Different type of wheel entirely.

Q 29. Different type of wheel? A. Different grit and grain, and so forth.

Q 30. When you say there is a difference, your difference is comparing the wheel you are familiar with with the wheel that appears on this machine. A. That is right; that is right.

Q 31. Did you at some time ever purchase any wheels from the Norton Company? A. We have a small stock for service, but it was very small, didn't amount to very much.

* * *

[355] DEPOSITION OF T. EDWARD DOSSETT, JR.

"Deposition on oral examination of T. Edward Dossett, Jr., a witness produced and sworn before me, Mrs. Bertha L. Hiatt, a notary public of Forrest County, State of Mississippi. This deposition was taken on behalf of the defendant, The American Emery Wheel Works, commencing at 10 o'clock A.M. on the 5th day of May, 1956, in the office of M. M. Roberts on the 5th floor of the Citizens Bank Building in the City of Hattiesburg, Forrest County, Mississippi.

"The deposition was taken and reduced to typewriting and the signature of the deponent to the deposition will be affixed to and he will subscribe his name to his testimony.

"Appearances: R. W. Heidelberg, Jr., of attorneys for plaintiff, Hattiesburg, Mississippi; and M. M. Roberts, of attorneys for defendant, Hattiesburg, Mississippi.

"T. Edward Dossett, Jr., being first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, reposes and says:

Direct Examination by M. M. Roberts

Q. Please state your name. A. T. E. Dossett, Jr.

Q. And where do you live? A. 316 Hemphill Street, Hattiesburg.

[356] Q. And are you sometimes identified as T. Edward Dossett, Jr.? A. That's right.

Q. You are identified in that manner in this notice for taking of deposition but you are one and the same person who works for Komp Equipment Company, are you not? A. Yes, sir.

Q. There's no other Dossett by that name works for the company? A. No, sir.

Q. And the company is located here in Hattiesburg? A. Yes, sir.

Q. Do you recall that heretofore about February 4, 1953, Komp Equipment Company sold a machine to T. H. Pearce Company? A. Yes, sir.

Q. What kind of a machine was it? A. Half horsepower Miller Falls grinder, number 77.

Q. Do you know where that machine had come from? How you had gotten it?"

Mr. Reynolds: Wait a minute. I object.

The Court: What is the basis of your objection?

Mr. Reynolds: The basis of the objection, your Honor, is that it doesn't appear that this witness was qualified at the outset to have any knowledge to afford any basis for the answer that he gave in answer to the next question. And the purpose of the deposition, as [357] appears from

what has been read so far, was not to establish the answer to which I am objecting in this deposition, but was for other matters, and is not relevant or material at this time in this case being presented by the attorney for the plaintiff.

Mr. Durkin: The purpose that Mr. Reynolds has just outlined— It seems to me this deposition is to be taken for a specific purpose; and if anything else comes out, it is not to be admitted.

The Court: Objection overruled. Go ahead.

Mr. Durkin: Thank you, sir.

(Mr. Durkin continues reading as follows:)

"Q. Do you know where that machine had come from? How you had gotten it? A. We ordered it from the Miller Falls Company."

Mr. Reynolds: I know my brother isn't trying to do me out of my objection. Since he read the question a second time, I would like to have my objection noted.

The Court: If it has not already been noted, Mr. Reynolds, your objection is noted and overruled. It will so appear on the record.

Mr. Reynolds: Thank you.

[358] (Mr. Durkin continues reading as follows:)

"Q. Do you know where the Miller Falls Company is located? A. No, sir.

Q. Do you know how long this particular machine had been in stock? A. Not exactly, no, sir. About two years I think.

Q. Did you have more than this particular machine in stock? I am trying to find out if you carried a number of these machines or just one? A. We had two of the Miller Falls and then several more Delco grinders. Two or three.

Q. But this particular machine was a Miller Falls Company machine you know? A. Yes, sir.

Q. Do you know where these people operate from? A. No, sir.

Q. You didn't know it was Greenfield, Mass.? A. I thought that was where it was but I didn't know.

Q. So you're not sure about that? A. That's right.

Q. Now, after you sold this machine to T. H. Pearce Company was the machine ever returned to you? A. Yes, sir.

Q. And do you remember approximately when it was returned? [359] A. About the 15th or 16th, I imagine, of February of 54.

Q. 53 wasn't it? Was it 1953 or 1954? A. 1953.

Q. What was the purpose to which the machine was put? If you know. A. Oh, I don't know. Sharpening tools out there.

Q. Well, who is T. H. Pearce Company? Why was it here? A. It was general contractors to put Camp Shelby on a standby basis.

Q. Where is that company located? A. Columbus, Georgia.

Q. And do you know who the superintendent on the job out there was? A. Creel B. Butler.

Q. Did you know him personally? A. No, sir.

Q. Do you know why the machine was brought back to you some little time after it was bought? A. The machine that we sent to them was not the machine that was quoted on and it was about $20.00 higher than the machine they wanted so they brought it back and got the cheaper machine. It was about $20.00 cheaper.

Q. When it was brought back was it in the same condition as when it went out? [360] A. No, sir, there was only one wheel on it.

Q. Which wheel was off? A. The right one.

Q. And what kind of wheel was it that was off? A. Seven inch grinding wheel. It was the rough one, I believe.

Q. And did you know why that wheel was off? A. It

came apart while shovels were being sharpened, I believe that's what it was.

Q. Now, after this machine was back do you remember an occasion on or about February 25th or 26th, 1954 when Mr. M. B. Berry came to you to see this machine and to make pictures of it? A. Yes, sir.

Q. Did you or not have a conversation with him? A. Yes, sir.

Q. And what was the nature of that conversation? A. Well, he wanted to take photographs of the machine and he wanted it dismantled with the guard on and with the guard off and that's about all, I think.

Q. Was that machine that you showed him the same machine that you had sold to this company and that had been returned? A. Yes, sir.

[361] Q. Had there been any change in the machine from the time that it was brought back to the store until you showed it to Mr. Berry? A. I had replaced the wheel that was gone. I had put a new wheel on the right side.

Q. And then did Mr. Berry, Mr. M. B. Berry, purchase any part of the machine from you, and if so, what? A. He purchased the left hand grinder wheel off the machine.

Q. And was that or not the one that came back to you on the machine after the other one had disintegrated? A. Yes, sir.

Q. Do you know what price he paid to you for that machine?"

Mr. Durkin: I take it he means wheel.

Mr. Reynolds: I don't know what it means. It is typed in there.

(Mr. Durkin continues reading as follows:)

"Q. Do you know what price he paid to you for that machine? A. $4.07.

Q. And was that wheel that you sold to Mr. Berry the wheel that was on there when you sold, was one of the

wheels on this machine when you sold it to this T. H. Pearce Company? A. Well, now, I don't know. That's the wheel that came back [362] to the Komp Equipment Company. Like I say, we don't know what make wheels are on them when they come in or go out.

Q. You mean to say that the wheels don't come from the same place as the manufacturer of the machine? A. No, they don't. Now I don't believe they do. In other words, Miller-Falls, I don't know where they make a grinding wheel or not but I did take some apart up there and they didn't have the make of wheels that the grinder, where the grinder was made. I think they buy them on a contract basis each year. I don't know for sure, but I think so.

Q. Did Mr. M. B. Berry identify himself as being connected with some company making an investigation growing out of an accident involving a claim of Whit Mason? A. Yes, sir.

Q. Who was it that prepared the machine for Mr. Berry to make the pictures you've mentioned? A. That was me.

Q. And did Mr. Berry take pictures of the machine with the guards on and then with the guards removed? A. Yes, sir.

Q. Who removed the guards for the picture to be taken after the guards were romoved? [363] A. I did.

Q. And was that the same machine that you were dealing with and that he took pictures of that you had sold to T. H. Pearce Company on or about February 4th, 1953? A. Yes, sir.

Q. Was that sale made in Hattiesburg or did you carry it down to Camp Shelby? A. They called in for the grinder and we carried it to Camp Shelby. Delivered it to them.

Q. Where is Camp Shelby as related to Hattiesburg, Miss.? A. About 12 miles south of Hattiesburg.

Q. In the area of and to the east of United States Highway Number 49? A. Yes, sir.

Q. Why did you sell this wheel on the left side of this machine to Mr. Berry? A. He wanted to buy it. I told him that it had come back with the machine and he wanted to buy it off the machine.

Q. You told him it had come back with the machine, but what did you mean, when had it come back with the machine? A. When it came back from Camp Shelby.

Q. From who? Who sent it back? A. T. H. Pearce Company.

[364] Q. Had that particular wheel that you sold to Mr. Berry been taken off or could you tell from the time that you had turned the machine over to them when you sold it until it was returned? A. I couldn't tell.

Q. Are you in a position to know whether that particular wheel was the same wheel that was on there when you sold it? A. No, I'm not. It hadn't been used. You can tell when a grinding wheel has been used and this one had not been used. Now whether it was the same wheel that I sold him or whether it had been changed or not I couldn't tell.

Q. What was represented to you when it was returned?"

The Court: There was an objection to that question and apparently a new question was posed.

(Mr. Durkin continues reading as follows:)

"Q. If you will just state what your impression about it was in spite of the objection."

Mr. Durkin: The objection here will be waived. I don't think it is too material.

(Mr. Durkin continues reading as follows:)

"A. Well, I didn't hear anything about the machine. It was just brought to me to put back in stock and we put a new [365] wheel on the machine and I didn't have any dealings with whether the machine was damaged in any way or not.

Q. Who was it took this emery wheel from the left side of the grinder in question? A. I did.

Q. And when you took that particular wheel off that had come back when the machine had been returned to the Komp Equipment Company, what did you do with reference to replacing the wheel on the same machine with another wheel? A. I took one out of stock and put it on the machine. The wheel that I sold Mr. Berry, is that the one? I replaced it out of stock.

Q. Do you have any idea of the name of the manufacturer of the wheel which Mr. Berry purchased from you that was on the machine that you took off? A. The Mid-West Abrasive Company made the wheel.

Q. At that time you sold it to Mr. Berry, did you know that? A. Not before I took it off.

Q. How did you learn about it afterwards? A. The name plate was on the wheel. Mid-West Abrasive Company made the wheel.

Q. And that name was seen by you first when? A. When I took it off the grinder.

[366] Q. Did Mr. Berry or not make inquiry of you of the name of the manufacturer of the wheel before you took it off? A. Yeah.

Q. And what did you advise him? A. I told him I didn't know.

Q. Now, after you did take the wheel off and found out whose stamp appeared on it, what then did you tell him? A. Oh, I just showed him the wheel and he said he wanted to buy it and I sold it to him.

Q. Did you tell him that you saw the name of the manufacturer on it or a name stamped on it? A. Yes.

Q. Now, from the time this machine was brought back to Komp Equipment Company that you testified about after it had been sold until the time that Mr. Berry bought from

you had the machine been tampered with or had anything happened to this wheel? A. No.

Q. In other words, you had done nothing to the wheel that you sold to Mr. Berry from the time the machine came back with that wheel only on until the time Mr. Berry came in to buy? A. That's right.

Q. Did you or not go to the second floor of Komp Equipment [367] Company with Mr. Berry in connection with this matter and if so what did you do there? A. I opened up some new grinders and dismantled them, took the wheels off to show him that I didn't know who made the grinding wheels on these grinders.

Q. Sometimes these grinding wheels are referred to as emery wheels, are they not? A. That's right. That's what they are.

Q. What furnishes the power for the ongoing of these wheels when they are in use or these machines? A. Electricity.

Q. Before this machine was returned to you by T. H. Pearce Company did you know that there had been an accident and that one of the wheels had disintegrated? A. Yes, sir.

Q. Had your company been advised of that before the machine was returned? A. Yes, sir.

Q. You, of course, was not there and do not know what happened? A. No, sir.

Q. Do you know who manufactured the wheel that you replaced on this particular machine after it was returned? A. No, sir.

Q. I believe you say that the wheel that you did take off [368] and sell to Mr. Berry was made by the Mid-West Abrasive Company ~~of Detroit,~~ Michigan? A. That's right.

Q. You, of course, wouldn't know whether this company manufactured the other wheel, the one that disintegrated or not would you? A. No, sir.

Cross-Examination by—"

The Court: Just a minute, Mr. Durkin. We have reached 4:30. Ordinarily I don't like to keep the members of the jury here after 4:30, particularly if any of them desire to catch a bus to get home. Would it inconvenience you any if we kept you here another 15 minutes? If it will, please be frank and tell me.

Mr. Reynolds: I want to object to the proposed cross-examination because I don't believe, under the circumstances the deposition is being read, my brother can attempt to cross-examine a witness whom, I say to the Court, he has made his own witness.

The Court: Objection overruled. You may go ahead.

(Mr. Durkin continues reading as follows:)

"*Cross-Examination by Mr. R. W. Heidelberg, Jr.:*

[369] X-Q. Now, Mr. Dossett, let me see if I can get this business straight about the grinder being sold and brought back and swapped again. As I understand it then the first grinder that your company sold to T. H. Pearce Company was a Miller-Falls grinder, is that correct? A. Yes, sir.

X-Q. And when that grinder was brought back it was replaced then with a Delco grinder. Is that correct? A. Yes, sir. That grinder was delivered to them at Camp Shelby and, now I'm not sure whether our driver brought that grinder back on that trip or just when that grinder—I—you see it was brought back to me but I don't know when they got the other grinder whether before or after they brought the Miller-Falls back.

X-Q. In other words, you don't know whether the exchange was made simultaneously or whether they brought the Miller-Falls grinder back before they received the Delco grinder or whether they got the Delco grinder before they brought back the Miller-Falls grinder? A. That's

right. George Komp is dead now and he is . . . had some of the—most of the dealings with that grinder.

X-Q. Mr. Dossett, explain to us please the type of business that Komp Equipment Company conducts. A. Industrial supplies, wholesale and plumbing fixtures and [370] heavy hardware.

X-Q. And this grinder we are talking about, what is the nature of that machine? A. It's a half horsepower grinder used to sharpen tools or to grind off edges of things.

X-Q. And I believe you said it was electricity that furnished the power? Did it have an electric motor on it? A. Yes, sir. Half horsepower.

X-Q. And how many emery wheels are affixed to the grinder? A. Two.

X-Q. And where are they located with reference to where the electric motor is? A. They are one on the left side and one on the right side.

X-Q. And I judge a shaft goes in the center of the motor and at each end of the shaft is affixed an emery wheel? A. That's right.

X-Q. Mr. Dossett, does Komp Equipment Company ever handle any used or second hand equipment for sale to its customers? A. No, sir, not at that time. Now, since then our machine shop has closed up and we have a few.

X-Q. At the time of these transactions, however, you handled only new equipment and merchandise, is that correct? A. That's right.

X-Q. Did your company have any use for an emery wheel which [371] had been used? A. No, sir.

X-Q. Did your company ever take any emery wheels which had been used in exchange for new ones? A. No, sir.

X-Q. Now, Mr. Dossett, suppose a customer has a grinder and used it for a few days and then wants to exchange it for a different one and the one he brings back in has emery wheels on it which have been used for a few days;

what do you do with those when they come back in for exchange?"

Mr. Reynolds: I object to this one. I don't see the materiality, relevancy, pertinency of this testimony to this matter on trial here today. I, therefore, object to that question.

Mr. Durkin: If there be any question, I will be glad to consult with the Court at the bench to iron out the materiality of it.

The Court: I will allow the question.

Mr. Durkin: Thank you, sir.

(Mr. Durkin continues reading as follows:)

"A. Well, on a deal like this, if they bought a new grinder in place of one they had had and they had used the wheels on each side of it then we would have to take the wheels off of the other grinder and put on the one they were [372] getting.

X-Q. You mean that you would take the wheels that they had used off of the grinder they were bringing back and put them on the grinder that they were to receive in exchange? Is that correct?"

Mr. Reynolds: I object on the same ground I previously mentioned. It is not what they did with any other grinder, but the grinder involved in this case. But that hasn't yet been identified, and we are pretty near the end of the plaintiff's case.

The Court: Very well; objection overruled. You may go ahead.

(Mr. Durkin continues reading as follows:)

"A. Yes, sir.

"X-Q. And what would you do with the emery wheels that you took off of the new grinder that you were delivering to your customer?"

Mr. Reynolds: Objection, if the Court please.

The Court: Objection noted; overruled. Go ahead.

(Mr. Durkin continues reading as follows:)

"A. Well, I would put them in stock.

X-Q. Well, would you put them in stock or would you put them back on the grinder that was returned to you?"

[373] Mr. Reynolds: Objection.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. That's right. Back on the grinder, that's right.

X-Q. In other words, you would take the wheels off of the grinder that was being returned and put them on the grinder that the customer was getting so that he would get the same wheels that he had used, the same emery wheels, is that right?"

Mr. Reynolds: Objection.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. That's right.

X-Q. And then you would take the new wheels that were already on the machine that you were then delivering to the customer and you would put those on the grinder that your customer was delivering back to you so that there would be an exchange of those emery wheels and that the new wheels would remain on the grinder that you then had for sale?"

Mr. Reynolds: Objection.

The Court: Objection noted; overruled.

(Mr. Durkin continues reading as follows:)

"A. That's right.

[374] X-Q. Then, Mr. Dossett, in this particular case I believe you said a few minutes ago that T. H. Pearce Company had had this Miller-Falls grinder for several days before it was returned to Komp Equipment Company? Is that right? A. Yes, sir.

X-Q. And they were using it all the time out there at Camp Shelby weren't they? A. Yes, sir.

X-Q. They were grinding tools every day they had it weren't they?"

Mr. Reynolds: Object.

The Court: Sustain the objection.

Mr. Durkin: I will skip to the next question.

(Mr. Durkin continues reading as follows:)

"X-Q. And then if the one emery wheel on the left hand side of that Miller-Falls unit which did not explode, if that emery wheel had been used by T. H. Pearce Company in sharpening tools when it was returned to your company, you would not have accepted that used wheel would you?"

Mr. Reynolds: I object; same ground.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. No, sir.

[375] X-Q. What would you have done with it?"

Mr. Reynolds: I object to that, your Honor.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. Well, we would have took it off and put it on the grinder they were getting.

X-Q. Now the grinder they were getting was a Delco grinder, was it not? A. Yes, sir.

X-Q. And the normal thing for you to have done then if they returned the Miller-Falls grinder with one emery wheel on it which had been used would be for somebody to take that used wheel off of the Miller-Falls grinder and place it on the Delco grinder. Right?"

Mr. Reynolds: Objection, your Honor.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. That's right.

X-Q. And to take the new wheel off of the Delco grinder and put it on the Miller-Falls grinder. Right?"

Mr. Reynolds: Objection.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

[376] "A. That's what we would do.

X-Q. And so then after this exchange was made you would have on the Delco grinder which was being delivered to Pearce, you would have two new, correction, you would have one new emery wheel on the right hand side, that's the one that replaced the one that exploded, and you'd have one used wheel on the left hand side, is that correct?"

Mr. Reynolds: Objection.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. That's right.

X-Q. And then on the Miller-Falls grinder which was placed back in your stock then you would have no emery wheel on the right hand side and you would have a new emery wheel on the left hand side, right?"

Mr. Reynolds: I object.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. That's right.

X-Q. And that new emery wheel on the left hand side would be the emery wheel that you took off of that Delco grinder, right?"

Mr. Reynolds: Objection.

[377] The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. Yes, sir.

X-Q. And then you took another wheel out of stock and put on the right hand side of this Miller-Falls grinder? A. That's right.

X-Q. Was that a Norton wheel? A. Yes, sir.

X-Q. So then, after this exchange was made what you had was then a Norton wheel on the right hand side of the Miller-Falls grinder and a new wheel on the left hand side

which had been taken off of the Delco grinder. Is that correct?"

Mr. Reynolds: Objection.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. Yes, sir.

X-Q. In other words, you can explain any answer you make, Mr. Dossett? A. That's what I would have done if it had come to me and those wheels would have been that way and that's the way it should be done and would have been done if it came in that way.

X-Q. I believe you said you don't handle used emery wheels, [378] you can't sell them can you? A. That's right.

X-Q. The only ones you can sell are new ones? A. That's right.

X-Q. And you say that that's the way that this exchange would have been made had the T. H. Pearce Company used that left hand emery wheel? A. That's right.

X-Q. Now, do you know of your own knowledge whether or not that wheel had been used?"

Mr. Reynolds: I object to that.

Mr. Durkin: His answer

The Court: It now appears to be 20 minutes of five. We have got some 10 or 15 pages more. Is the jury perfectly content? All right; go ahead.

Mr. Reynolds: Has your Honor ruled on my objection?

The Court: The answer was "No, I don't." Do you object to that question? The question was "Now, do you know of your own knowledge whether or not that wheel had been used?"

Mr. Reynolds: I, therefore, now move all of his testimony with regard to the wheel be stricken.

The Court: Motion is denied.

(Mr. Durkin continues reading as follows:)

[379]: "X-Q. You don't know, then, Mr. Dossett, whether

the wheel that you sold Mr. Berry was the wheel which you swapped from the Delco grinder to the Miller-Falls grinder or whether it was already on the Miller-Falls grinder, do you?"

Mr. Reynolds: I object, your Honor.

The Court: Objection noted; overruled.

(Mr. Durkin continues reading as follows:)

"A. No, I don't. It had not been used. It was a new grinding wheel.

X-Q. You know it was a new one that you sold to Mr. Berry, is that right? A. That's right.

X-Q. And Mr. Dossett, you don't know then what wheel or what brand of wheel was on the Miller-Falls grinder when your company originally sold it to T. H. Pearce Company, do you? A. That's right.

X-Q. Now, you don't know how that Miller-Falls grinder got back from T. H. Pearce Company to Komp Equipment Company either, do you? A. No, I don't know whether it was delivered by them or picked up by our truck.

X-Q. And you don't know whether any of the other employees at Komps, t[illegible] salesmen or any of the other clerks there, made an exchange of those emery wheels, do you? [380] A. I don't believe anyone there did because when it came to me it only had one wheel on it and if someone had put one wheel they should have went ahead and put two wheels.

X-Q. Well, now, if the exchange had been made out at Camp Shelby when the new unit was delivered to Pearce and the Delco was delivered to Pearce in exchange for the Miller-Falls and the exchange had been made out there so that there wouldn't be another wheel to replace that would be the logical thing to have resulted would it not?"

Mr. Reynolds: I object.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. That's right.

X-Q. In other words, the only way that you could get two new wheels on that Miller-Falls grinder was to take one of them out of stock because the other wheel had already exploded at that time, hadn't it?"

Mr. Reynolds: I object to that.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. That's right.

X-Q. And if the exchange had been made by your salesman out at Camp Shelby or by someone else when the machines were [381] exchanged, then there would be a missing wheel, would there not?"

Mr. Reynolds: Objection.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. That's right.

X-Q. And that would be a logical explanation as to why there was one new wheel and one wheel missing when you first saw this Miller-Falls unit back at the store, right?"

Mr. Reynolds: Objection.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. Yes, sir.

X-Q. Then when you stated to Mr. Roberts a few minutes ago that the Mid-West Abrasive Company emery wheel that you sold to Mr. Berry was the same one that was on the Miller-Falls grinder when it came back from T. H. Pearce Company, you did not mean to say, did you Mr. Dossett, that that was the same wheel that was on the grinder at the time the other wheel exploded, did you?"

Mr. Reynolds: I object to that, your Honor.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

[382] "A. I don't know whether it was on there then or not.

X-Q. In other words, you just don't have any knowledge about that at all, do you?"

Mr. Reynolds: I object to that, your Honor.

The Court: Objection noted and overruled.

(Mr. Durkin continues reading as follows:)

"A. That's right.

X-Q. And you don't know what brand of emery wheels or what make of emery wheels were on the Miller-Falls grinder when it was originally sold to Pearce? A. That's right.

X-Q. Now, you say it was an emery wheel manufactured by the Mid-West Abrasive Company that you sold to Mr. Berry a couple of weeks after this accident, is that right? A. That's right.

X-Q. Now, who is Mr. Berry? What company does he represent? A. Mr. Berry told me that he was representing the American Emery Wheel Company."

The Court: The next question is ruled out.

Mr. Durkin: Yes, sir.

(Mr. Durkin continues reading as follows:)

"X-Q. Now, you told Mr. Roberts a while ago, or rather Mr. Roberts stated in his questioning and you answered [383] affirmatively that Mr. Berry purchased this wheel sometime in the latter part of February of 1954. That would be a year after the machine was brought back from T. H. Pearce Company, was that answer correct? A. That's right.

X-Q. You think, then, that the grinder stayed in your stock a year before Mr. Berry came there to take pictures of it and bought that wheel from you? A. Well, I don't know exactly when that machine got back but they was, there has been several photographers in there and several

different representatives and to the best of my knowledge that is when he came in. Latter part of February of 54.

X-Q. And then that—this grinder would have been in your place of business then for more than a year after the accident before the new emery wheel was sold to Mr. M. B. Berry, is that correct? A. Yes, sir.

X-Q. And were you working all during that year? A. Yes, sir, except for vacation.

X-Q. Well, how do you know then that nobody had exchanged those wheels again after you put the Norton wheel on that grinder? A. There was no cause to. We have plenty of wheels in stock.

[384] X-Q. There are other employees who had access to this grinder were there not? A. Oh, yeah.

X-Q. And some of them could have exchanged the wheels, couldn't they without your knowledge? A. I don't see how.

X-Q. Well, how long is your vacation? A. Two weeks.

X-Q. Well, you took your vacation didn't you? A. That's right but they don't have any reason to change the grinding wheels.

X-Q. In other words, you are just assuming that nobody changed it, but you really don't know, do you? A. That's right.

X-Q. Mr. Dossett, you stated a few minutes ago that at Mr. Berry's request you went upstairs and you opened the crates of several new grinding machines that you had in stock and took the emery wheels off to see what company had manufactured them. Did I understand you correctly? A. Yes, sir.

X-Q. What was the purpose for that? A. To show him that I didn't know what kind of wheels came on the machines.

X-Q. In other words you were trying to show him that the same [385] make of grinder would have emery wheels

manufactured sometimes by different companies, is that what you mean? A. That's right.

X-Q. And did you discover that that was true? A. Yes, sir.

X-Q. What make of emery wheels were on these machines that you opened up? A. Mid-West Abrasive Company.

X-Q. And you have had occasion though to see other emery wheels, other brands of emery wheels on this same type of grinder have you not? A. Yes, sir.

X-Q. You've had occasion to see wheels manufactured by the American Emery Wheels Works have you not? A. I don't believe I've seen an American on any of them.

X-Q. You don't know about American. How about Norton? A. No, now, Chicago—

X-Q. Is that the Commercial Emery Wheel Company of Chicago you are talking about? A. That's right.

X-Q. You've seen that type wheel haven't you? A. Yes, sir.

X-Q. Then, on the same type of grinder like a Miller-Falls grinder or a Delco grinder sometimes you will find emery [386] wheels manufactured by one company and sometimes you will find them manufactured by another company, is that correct? A. That's right.

X-Q. And sometimes it's possible that on one side of a machine there would be a wheel manufactured by one company while on the other side there would be a wheel manufactured by still a different company, is that correct? A. Well, I've never seen that. I guess it's possible.

X-Q. Because the same company that makes the grinder does not make the emery wheel does it? A. That's right.

X-Q. In other words, Miller-Falls doesn't manufacture the grinder at all, does it? A. That's right.

X-Q. They just assemble it, don't they? A. That's right.

X-Q. And they may get the machinery, the motor and

machinery from one company and the grinders from another company? A. That's right.

X-Q. And they may get the grinders from different companies at different times, right? Correction, I mean the emery wheels from different companies at different times? A. That's right.

X-Q. And you said you thought they were let on competitive bids [387] usually in the industry, is that right? A. That's right.

X-Q. And then in the assembly line, why, the people who are putting those things together reach in a bin and take an emery wheel and bolt it on the end of that shaft and then they take an emery wheel out of one bin for one type, that is a rough wheel, and out of another bin for the smooth wheel, is that right? A. I don't know just how those things are assembled up there but I guess it could happen that way when they handle more than one brand of emery wheel.

X-Q. So, it's entirely possible, then that you could have a grinder with a Mid-West Abrasive wheel on one end and an American Emery Wheel Works wheel on the other end, isn't it?"

Mr. Reynolds: I object.

The Court: I will sustain that objection. That is merely a conclusion.

(Mr. Durkin continues reading as follows:)

"X-Q. Getting back to this grinder, the Miller-Falls grinder that was taken back from T. H. Pearce Company and exchanged for the Delco grinder, I believe you said you didn't know how that grinder actually got back into the Komp building didn't you? [388] A. That's right.

X-Q. When was the first time you recall seeing it? A. Well, it was brought up to the front of the building there to be put back in stock and sold.

X-Q. And you don't know how long it had been on the

premises at that time, do you? A. Well, I imagine about a day or a day and a half or two days.

X-Q. In other words, you think it had been there a day and a half or two days before you saw it then? A. That's right.

X-Q. And it had been on your premises and in your building there a day and a half or two days before you took the Norton emery wheel from stock and put it on the right hand side of that grinder? A. That's right.

X-Q. And is it possible, Mr. Dossett, that someone could have made the exchange of the emery wheels from the Delco grinder to the Miller-Falls grinder in the back there before it got up to the front sales floor where you work? A. It would be possible."

Mr. Reynolds: I move to strike that out; it is purely speculative.

The Court: It may be stricken. The jury is instructed to disregard it.

[389] (Mr. Darkin continues reading as follows:)

"X-Q. Now, your job is what? A. Well, I'm in charge of the outside floor part where all of the customers come in to be waited on and, you know.

X-Q. In other words, you are in charge of the sales made on the floor there in, where your merchandise is on display there on the floor, is that right? A. That's right and keeping the stock up, seeing that it is all put up right.

X-Q. You don't have anything to do with sales made say out to Camp Shelby then? A. That's right.

X-Q. And you wouldn't have anything to do with the exchange of the Delco grinder for the Miller-Falls grinder with T. H. Pearce Company, would you? A. That's right.

X-Q. And the first time that you would come into any contact with that transaction would be after the exchange had been made and the Miller-Falls grinder delivered up

front so that you could put it back on display and try to sell it? A. That's right.

X-Q. Then there was ample opportunity for other employees of Komp to have exchanged the emery wheels from the Delco grinder to the Miller-Falls grinder before you ever had a chance to see it, is that right?"

[390] Mr. Reynolds: Objection to that. I think that is also purely speculative.

The Court: I think this is a little different. I will allow it to stand.

(Mr. Durkin continues reading as follows:)

"A. There was opportunity, yeah.

X-Q. And if that emery wheel on the Miller-Falls grinder had been used by Pearce, that is the normal thing that would happen when that machine was brought back to exchange, is that right?"

Mr. Reynolds: Objection.

The Court: Objection overruled. He may answer.

(Mr. Durkin continues reading as follows:)

"A. That's right.

X-Q. And that's the sort of thing that you would normally expect to happen if that emery wheel had been used at all?"

Mr. Reynolds: I object.

The Court: Objection overruled.

(Mr. Durkin continues reading as follows:)

"A. That's right.

X-Q. Mr. Dossett, then am I correct in summarizing what you have testified to be this: That the first time that you saw the Miller-Falls grinder which was some day and a half [391] or two days after it had been brought back to the Komp warehouse, at that time this Mid-West Abrasive Company wheel was on the left hand side of the grinder and you left it where it was and put a Norton wheel on the other side and that Mid-West wheel stayed

on that grinder for the next year til you sold it to Mr. Berry. Is that a fair statement of what you have just testified? A. That's right.

X-Q. And you don't know what happened to that grinder before you got it under your possession there on the sales floor? A. That's right.

X-Q. And you don't know where that Mid-West Abrasive Company wheel came from do you? A. That's right.

X-Q. And you don't know whether it was on the Miller-Falls grinder when it was first sold to T. H. Pearce Company or not, do you? A. That's right.

X-Q. Mr. Dossett, how many employees, approximately, work at the Komp Equipment Company, or how many rather worked for Komp Equipment Company during 1953 at the time of this transaction with T. H. Pearce Company? Your best judgment. A. Well, it was around nine or ten in the building and oh, two or three outside salesmen.

[392] X-Q. And Mr. Dossett, let's talk about these grinders generally. Both the Miller-Falls type of grinder and the Delco grinder. When Komp Equipment Company purchases those from the distributor are they fully assembled? A. Yes, sir.

X-Q. Do you ever have to assemble those grinders yourselves? A. No, sir.

X-Q. And when you take them out of the original carton in which you receive them they are fully assembled and ready for use? A. That's right.

X-Q. When a grinder is fully assembled can you read the label that the manufacturer of the emery wheel has affixed to the emery wheel itself? A. No, sir.

X-Q. Why not? A. There is a plate that holds your emery wheels to the shaft to keep them in place and keep them from flying off and it covers that little pasteboard nameplate is what it is. It's covered up.

X-Q. So then you never had occasion to observe or

know what make of emery wheel is actually on any grinder when you sell it, do you? A. That's right.

X-Q. And the only time that you could determine that would be to take the thing apart and take the wheel off to read [393] that nameplate, is that right? A. That's right.

X-Q. Is that the reason you had to disassemble it for Mr. Berry so that you could see what make of emery wheel was on these various grinders in your stock? A. Yes, sir.

X-Q. Now, getting back to this Miller-Falls grinder that had been sold to T. H. Pearce Company, was it in the original carton when it was sold to them? A. Yes, sir, when it was sold to them.

X-Q. So Komp-Equipment Company did not take the emery wheels off of the Miller-Falls grinder or exchange them in any way prior to or before it was sold to Komp, is that right? A. That's right.

X-Q. It was taken right out of the original carton and delivered to T. H. Pearce Company? A. That's right.

X-Q. And by original carton I mean the carton in which it was received from Miller-Falls Company, is that what you mean? A. That's right.

Re-direct examination by M. M. Roberts:

Q. Mr. Dossett, you've been asked a good many questions about this emery wheel and why that you had said to me that the [394] remaining emery wheel on this machine was the one that was on there when the machine was brought back to Komp Equipment Company by T. H. Pearce Company and I want to know why you told me that and then discussed it generally afterwards where there might be a different impression. I'm not sure that I understood why you were able to tell me that it was the same wheel and then later wasn't sure about it."

Mr. Durkin: I will abide by whatever the Court wants.

The Court: I will allow the question. Objection overruled.

(Mr. Durkin continues reading as follows:)

"A. Well, the grinder only had one wheel on it when it came up to me and the reason I say it came back from Camp Shelby was that no one there in the store seemed like would put one wheel on the grinder without putting both of them on there and also because we do not handle a Mid-West grinding wheel. We don't stock them and that's why—the reason I thought it came back from Camp Shelby.

Q. What kind of grinding wheel was on there that you sold to Mr. Berry? A. Mid-West Abrasive Company wheel.

Q. And does Komp Equipment Company handle that kind of a [395] wheel? A. No, sir.

Q. And you don't know whether that was the kind of a wheel that was on there when it came from the manufacturer or not I believe you said. A. That's right.

Q. But since you said there was only one wheel on and the other one gone when it came to your floor for handling you concluded what? A. That it did come from Camp Shelby with the machine when it came back.

Q. What came from Camp Shelby with the machine? A. The grinding wheel.

Q. The single grinding wheel remaining you mean? A. That's right.

Q. And who else could or would have made a change of one wheel and not changed the other in your place? A. Well, anyone could have but I don't see why they would.

Re-Cross Examination by R. W. Heidelberg, Jr.:

X-Q. Mr. Dossett, you do know, do you not, that the Delco grinders sometimes have Mid-West Abrasive emery wheels on them? A. Yes, sir.

X-Q. Do you know also that the Miller-Falls grinder sometimes [396] have American Emery Wheel Works emery wheels on them? A. No, I don't know for sure about that.

X-Q. You don't know that they do not ever have the American, you just don't have any knowledge about it, is that correct? A. That's right.

X-Q. Do you know whether or not of your own knowledge if Miller-Falls grinders ever have Mid-West Abrasive Company wheels on them when they are received by Komp? A. No, I do not.

X-Q. You just don't know where those Mid-West wheels came from do you? A. That's right.".

Mr. Durkin: I don't know; I imagine the original is signed.

The Court: Signed on the 5th day of May, 1956.

I certainly think the jury has put in a full day's work today. I hope you will not get wet. We will stop here until 10 o'clock tomorrow morning.

(Adjourned at 5:01 p.m. until Friday, June 1, 1956, at 10:00 a.m.)

[Opinion of Hon. Edward Day, Granting Defendant's Motion for a Directed Verdict at the Conclusion of Plaintiff's Testimony.]

[449] The Court: I am frank to say, gentlemen, I have given this matter a lot of thought and I am deeply conscious of the fact that this is an extremely important case from the standpoint of the plaintiff and from the standpoint of [450] the defendant. Perhaps in an abstract sense it is conceivably of more importance to the plaintiff.

As I see it, sitting as a federal court, it is my duty under the doctrine of *Erie* v. *Tompkins*, to follow the state decisional law if there is any decisional law of the courts of last resort of the state where the tort occurred. Clearly under the *Troubridge* case, this being a situation where the jurisdiction of this Court is based on diversity of citizenship and the existence of a controversy in the required jurisdictional amount, I must first look to see what law applies.

The conflict of law rules of Rhode Island certainly would dictate that the law of Mississippi where the alleged tort occurred shall govern.

Now counsel have cited to me several cases from a court of last resort in the State of Mississippi. This is not a situation where the Court is without clear indication, it seems to the Court, of what the Mississippi law is. I am not called upon to read dicta and try to predict what the court of last resort of Mississippi would do. It seems to me that the position of the Supreme Court of Mississippi is clear. It is unlike the situation presented in the case of *Troubridge* v. *Abrasive Co. of Philadelphia*, reported in 190 F.2d 825, where the court says in the [451] absence of any decisions to the contrary it would assume that the doctrine of the case of *MacPherson* v. *Buick Motor Co.* was the law of Oregon because of its generally wide acceptance, and the court states in its opinion in that case at Page 828:

> "* * * Hence, in the absence of any decisions to the contrary, we assume it to be the law of Oregon that there is a duty on a manufacturer of a chattel to use reasonable care in manufacturing whenever there is an unreasonable risk that the chattel, if defectively made, will cause substantial harm."

Citing Restatement, Torts, Section 395.

I am frank to say if this were an original question before

this Court, I certainly would not follow the doctrine which seems to me to be the law of Mississippi. But I feel after considerable research of my own and consideration of this problem, that the Supreme Court of Mississippi in the case of *Ford Motor Co. v. Myers*, reported in 117 So. 362, although it was decided in 1928, has clearly indicated that Mississippi is one of those states which refuses to impose liability on a manufacturer for defects and negligence in the manufacture of appliances by it which can be and will become highly dangerous when put to the uses for which they are intended, where there is no contractual privity or privity of contract between the user and the manufacturer.

[154] I think that the rule, as enunciated by the Supreme Court of Mississippi, is a harsh rule and I think it is contrary to the great weight of authority. But as I see the authorities and as I view my position in the matter, it being not an original question for me, I feel that I am bound by the decision of the Supreme Court of Mississippi in *Ford Motor Co. v. Myers*. For that reason I will reluctantly grant the motion to dismiss.

The defendant's motion to dismiss is granted. You will bring in the jury, Mr. Marshal.

Mr. Durkin: May I continue before you do that?

The Court: Continue on what?

Mr. Durkin: The Court has assumed to this point that the law of Mississippi is the applicable law in this case.

The Court: I thought we agreed it was.

Mr. Durkin: No, sir; we did not.

The Court: What do you have to say now?

Mr. Durkin: The Court has held previously in this case that the procedural questions are to be determined by the law of the forum, Rhode Island law.

The Court: That is right.

Mr. Durkin: I read to the Court from the case of *Cliff* v. *Pinto*:

> "In support of his second contention [453] the defendant argues in substance that this action cannot properly be maintained in this state, because the contract is governed by the law of New York which does not allow an action of this nature to be brought.
> * * * * "

This is a case in which, as I understand it, a case of alienation of affection is being brought in the State of Rhode Island. During the case the defendant alleges that the case cannot be maintained in Rhode Island because the law of New York does not recognize any such cause of action. The same as the Court has held here to the present time. The Court has held we cannot maintain an action in Rhode Island because in Mississippi the doctrine of *MacPherson* v. *Buick* is not recognized.

Reading from Judge Baker of— I imagine it is the Supreme Court of Rhode Island—in August, 1948, and continuing:

> "At the trial of the case in the superior court the defendant, however, offered no evidence whatever tending to prove the pertinent law of that state. He takes the position that, by reason of the provisions of P.L. 1940, chap. 939, he is not required to present such evidence, since in the circumstances and under such chapter this court is required to take judicial notice of the New York law. The first two sections of chap. 939, supra, read as follows: 'Section 1. Judicial Notice. Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States. [454] Sec. 2. Information of the court. The court may inform itself of such laws in such manner as

it may deem proper, and the court may call upon counsel to aid it in obtaining such information.'

"In reply to defendant's position the plaintiff, however, calls our attention to sec. 4 of that chapter which provides: 'Evidence as to Laws of Other Jurisdictions. Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.' She contends that no reasonable notice concerning the New York law was given her either in the pleadings of the case or otherwise and, therefore, that this court is not bound under secs. 1 and 2 to take judicial notice of the pertinent law of that state."

Now the pleadings in this case have made absolutely no reference to any conflict or any difference between the applicable law of this forum or the law of the situs. And under the procedural law of the State of Rhode Island, which follows the Uniform Judicial Notice Act, under Section 4 thereof pleading of such a fact is a necessary component part before it can be proven.

Mr. Reynolds: I was under the impression that we had agreed upon the fact of what the local law of Rhode Island was, but since—

The Court: Local law of Rhode Island—you mean [455] as to the conflict.

Mr. Reynolds: With regard to the conflict of laws, there is nothing to my brother's position. Here is a case, *Peterson* v. *Chicago, Great Western Railway Co.*, 3 F.R.D.. It commences on Page 346. It was decided in 1943 and I am reading from Page 349. It is the second paragraph in that part of the decision which begins with "6". Page 349: I am quoting from the court record:

"There remains only the matter of how the lex loci delicti is to be pleaded and proved. * * * "

I understand that is my brother's argument.

"In the state court, through long usage, by reason of the territorial circumscription of the government of its creation, the law of a foreign state must be specially pleaded and proved and Nebraska so holds. * * * "

and it cites a case—

"But, under the rule heretofore adverted to, * * * "

that is the federal rule here—

"this court is not thus restricted. It must take judicial notice of those laws and apply them as they are applied in the courts of the state whose law is made material by the mere allegation of the pleadings touching the point of origin of the cause of action. * * * "

and, of course, the pleadings in this case say that this man was injured down in Hattiesburg, Mississippi, so it is right [456] in the pleadings in this case—

"There is no question respecting whose law governs. The only distinction arises in the technique of pleading and proof, and that distinction issues from a very real difference in the constitution of the two judicial systems."

There is other authority. The Supreme Court of the United States:

"The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof."

That is 114 U.S. 218, 5 Sup. Ct. 857, 859, 29 L. Ed. 94; also, see *Faris* v. *Hope*, 298 F. 727. It refers to this *Petersen* case under that. There is absolutely nothing to that.

The Court: That certainly has been my notion of the

duty of the Court since I have been on this bench, that if a case is tried before me and jurisdiction is based upon diversity of citizenship and the existence of a jurisdictional amount, it is the problem of the Court to determine on its own initiative, if need be, what law is to be applied. I don't think I can depart from the rule in *Erie* v. *Tompkins* simply because counsel don't raise the question of what law applies or give some sort of notice in pleading.

[457] Mr. Durkin: It is my understanding, sir, that the law of the forum is determinative of all procedural questions.

The Court: It is not a question of procedure; it is a question of substance.

Mr. Durkin: Pleading, sir?

The Court: No, the question of what law governs.

Mr. Durkin: This that I have read is specific to pleading.

The Court: That is the practice in the state courts, yes.

Mr. Durkin: Isn't the federal court bound by the procedural questions?

The Court: It is certainly not bound as to pleading and practice that is followed in the state courts. On matters of procedure, yes, to a certain extent we are.

Mr. Durkin: I would believe that the court would be bound by the law of Rhode Island, that Rhode Island is governed by the Uniform Judicial Notice Act.

The Court: I don't think so, Mr. Durkin, and without being abrupt I am going to reject your contention in that regard, and I want it to appear upon the record that you urged it.

Mr. Durkin: Yes, sir.

[458] The Court: And the Court has felt it is bound to take judicial notice of the statutes, laws, and decisions in other states.

You will bring in the jury, Mr. Marshal.

This motion was under Rule 41, was it not?

Mr. Durkin: Yes, sir.

(Jury returned at 3:08 p.m.)

The Court: Mr. Foreman, lady and gentlemen of the jury, you had quite an enforced absence from the courtroom and during your absence the Court has been concerned with some very serious questions of law that have been presented by counsel. After considerable discussion and thought and effort, the Court has decided to take the responsibility upon its shoulders of deciding those questions of law and has granted a motion by the defendant to dismiss the complaint upon certain legal principles over which the Court has no control. I won't bother you with the details. They are now a matter of record, and any error the Court has made is subject to review by a higher tribunal.

The Court's action in this regard makes it unnecessary for you to consider the matter any longer and you are now excused subject to return when we have need of your services again. We will give you just as much notice as we can. You are now free to go.

(Adjourned at 3:10 p.m.)

No. 155

No. 5168

Office Supreme Court, U.S.
FILED
MAY 31 1957
JOHN T. FEY, Clerk

United States Court of Appeals for the First Circuit.

No. 5168.

WHIT MASON,
PLAINTIFF, APPELLANT,

v.

THE AMERICAN EMERY WHEEL WORKS,
DEFENDANT, APPELLEE.

RECORD APPENDIX TO BRIEF FOR APPELLEE.

FRANCIS V. REYNOLDS,
724 Industrial Bank Building,
Providence, R. I.
Attorney for Appellee.

Index.

Excerpts from testimony before Judge Day — A135

Frederick N. Lyman

- Direct — A135
- Cross — A137
- Redirect — A148
- Recross — A149
- Redirect — A150
- Recross — A151

John P. Brady

- Direct — A152
- Cross — A171
- Redirect — A183

Robert Morton

- Cross — A184
  - Defendant's Exhibit A marked — A191
  - Defendant's Exhibit B marked — A199
- Redirect — A216
- Recross — A217

Charles W. Parsons

- Cross — A219

RECORD APPENDIX.

In the District Court of the United States for the District of Rhode Island.

WHIT MASON
v.
THE AMERICAN EMERY WHEEL WORKS
C. A. No. 1804

Excerpts from Testimony before Judge Day.

[2] FREDERICK N. LYMAN, SWORN

Direct examination by Mr. Durkin.

1 Q. Mr. Lyman, will you tell us, please, by whom you are employed? A. Millers Falls Company, Greenfield, Mass.

2 Q. Can you tell us whether or not your company manufactures bench grinders? A. No, we do not.

3 Q. Can you tell us whether or not your company, in effect, purchases any bench grinders? A. Yes, we do.

4 Q. From whom do you purchase these bench grinders?

Mr. REYNOLDS. I don't want to be technical but I would object until the capacity in which Mr. Lyman is employed by Millers Falls is established. I presume he is probably an executive of high order but I think we ought to have something to presume he would know this information he is giving us.

5 Q. You are what— [3] A. I am the sales manager in charge of the Industrial Division.

6 Q. In that Industrial Division, does that include these bench grinders? A. Yes, it does.

7 Q. You say you purchase these bench grinders, sir? A. Yes, we do.

8 Q. Can you tell us from whom you purchase them? A. We purchase them from the Kingston Conley Division of Hoover Company.

9 Q. Do you purchase them from anyone else? A. No, we do not.

10 Q. Is there any name plate on these machines identifying your particular company? A. As they come in to us?

11 Q. First of all, is there? A. Yes, there is.

12 Q. Do you put that name plate on? A. No, we do not.

13 Q. Who puts it on?

Mr. REYNOLDS. If he knows of his own personal knowledge, your Honor. If he doesn't, I think he should say so.

The COURT. That is understood.

[4] 14 Q. You say you don't put them on? A. No, we do not.

15 Q. Do you send the name plates to anyone to be put on? A. Yes.

16 Q. To whom do you send them? A. To the Kingston Conley Division of Hoover Company.

17 Q. When these machines are received by you from the Hoover Company, can you tell us whether or not anything is done to those machines while they are at your premise? A. No, they are merely stored.

18 Q. For what purpose, sir? A. For future sale by Millers Falls Company.

19 Q. When you get orders for those machines, you ship them out? A. That is correct.

Mr. DURKIN. I think that is all, sir. Thank you.

Cross-examination by Mr. Reynolds.

20 XQ. Mr. Lyman, how long have you been employed by the Millers Falls Company as a sales manager? A. As a sales manager, for about 18 months.

21 XQ. About 18 months? A. Yes.

22 XQ. You were not the sales manager in the year 1952 or '53? A. No.

23 XQ. Do you know who was, of your own personal knowledge? [5] A. There was no one in that capacity at that time.

24 XQ. You are speaking of the practice with regard to the past 18 months when you have been sales manager? A. Yes, but I have been with the firm for 18 years and have worked in the office at previous times and feel that I am familiar with the practice.

25 XQ. And you were subpoenaed to come here today, I take it? A. Yes, I was.

26 XQ. You were subpoenaed? A. Yes.

27 XQ. How far is it from here to Greenfield? A. Approximately 100 miles.

28 XQ. And you handle more than one type of grinder?

Mr. DURKIN. Excuse me, sir. I think the subject is a bench grinder.

Mr. REYNOLDS. This is cross-examination, your Honor.

Mr. DURKIN. I would think it would be immaterial then, sir.

The COURT. What is that?

Mr. DURKIN. I would think it would be immaterial if we went into any other type grinder other than a bench grinder.

The COURT. I will allow reasonable latitude. Go [6] ahead, Mr. Reynolds.

29 XQ. Do you people sell other than the so-called bench grinders? A. Yes, we do.

30 XQ. Generally speaking, you sell quite an assorted number of grinders of one kind or another, don't you? A. We manufacture two different types.

31 XQ. Some you manufacture yourselves? A. Oh, yes; oh, yes. In fact, all other than the bench grinders.

32 XQ. You manufacture your own grinders except the bench grinders? A. Yes.

33 XQ. Did you manufacture your own grinders in 1952 to your personal knowledge, Mr. Lyman? A. Yes.

34 XQ. And did your company manufacture so-called bench grinders in 1952 to your knowledge? A. No, we did not.

35 XQ. Is it your understanding that you had the Hoover Company make a bench grinding machine? Now we are speaking as of 1952. A. Yes.

36 XQ. You say you do have some knowledge of it? A. Yes.

37 XQ. In what capacity, Mr. Lyman, would you come to that [7] knowledge in 1952? What would be your job? A. Well, at that time I was the district sales manager for the firm.

38 XQ. District sales manager? A. Yes.

39 XQ. What would that district embody? A. That district embodied headquartering in Texas and covering several states in the southwest area.

40 XQ. Did it cover Mississippi? A. No, it did not.

41 XQ. Was there some other district manager covering Mississippi? A. Yes, there was.

42 XQ. What was his name? A. His name was Harry Creller of Atlanta, Georgia.

43 XQ. How do you spell his name? A. C-r-e-l-l-e-r.

44 XQ. To your personal knowledge is he living or dead? A. He is living.

45 XQ. And is he connected with the Millers Falls Company? A. Yes, he is.

46 XQ. Is he still the district supervisor of an area that would cover Mississippi? A. No, he is not.

47 XQ. Where is he now located? [8] A. He is in Atlanta but there has been a switch or a change in the territories, and the State of Mississippi now comes under the jurisdiction of a man by the name of H. E. Held; H-e-l-d.

48 XQ. How long has that been in force approximately? A. Approximately 18 months.

49 XQ. But in 1952 this gentleman by the name of Creller was the district supervisor? A. District manager,—

50 XQ. District manager. A. Yes.

51 XQ. —of the area which included Mississippi? A. That is correct.

52 XQ. And Mr. Creller is still working for the Millers Falls Company? A. Yes.

53 XQ. And his offices are presently located in Atlanta, Georgia? A. That is correct.

54 XQ. As a district manager in Texas— Is that where you said you were? A. Yes.

55 XQ. Do you mean that you were physically living in Texas? A. Yes.

56 XQ. Well, now, was that where you were located in 1952, physically located? [9] A. Physically located.

57 XQ. In Texas? A. Yes.

58 XQ. How would you know what the Millers Falls Company was doing up here in Greenfield, Mr. Lyman, if you were physically located in Texas? A. Well, it was my responsibility to sell their products.

59 XQ. But not in Mississippi. A. Not in Mississippi.

60 XQ. You see, the incident out of which this suit arose occurred in Mississippi. A. I see.

61 XQ. And that is why I am bringing that to your attention. Now in 1952, Mr. Lyman, how long had you been in Texas, approximately now. I am not trying to tie you down. A. Let's see. I went down there in 1946.

62 XQ. Had you been living in Texas continuously since 1946? A. Yes.

63 XQ. When did you return to New England? A. In January of 1955.

64 XQ. In January of 1955. You were in Texas from 1946 to January, 1955. Is that right? A. That is correct. [10] 65 XQ. Well, now, isn't it a little difficult, Mr. Lyman, to say that you have personal knowledge, in view of your residence in Texas, as to what the practice was here in New England in 1952? A. I don't think so, insofar as bench grinders are concerned. We have only marketed one line of bench grinders in the 18 years that I have been with the firm. They have never changed. I previously, prior to going to Texas,—I was in the office here in Greenfield and I remember, of course, with whom we were doing business, bench grinder wise, at that time.

66 XQ. But you left to go to Texas in 1946. A. That is true.

67 XQ. Is Millers Falls' office in Greenfield the so-called head office or home office of this Millers Falls Company? A. Yes, it is.

68 XQ. Would there be someone there while you were in Texas who was handling orders, sending orders out to some companies to make bench grinders? A. I should think our purchasing agent would be.

69 XQ. Who was the purchasing agent in 1952, would you recall? A. Yes, a Mr. Charles Parsons.

70 XQ. Is he living or dead? A. Yes, he is alive.

71 XQ. Is he still connected with the company? [11] A. Yes, he is.

72 XQ. Is he located in Greenfield? A. Yes.

73 XQ. And is he actively associated with the Millers Falls Company? A. Yes, he is.

74 XQ. In what capacity now? A. Purchasing agent.

75 XQ. Was he the purchasing agent, to your knowledge, in 1952? A. Yes, he was.

76 XQ. Were you personally subpoenaed to come today or was the subpoena running to some person connected with the Millers Falls Company who might shed some light on whom they bought their bench grinders from? A. I was personally subpoenaed.

77 XQ. Did you have some knowledge—You can answer this just Yes or No. Did you have some knowledge of the gist of this case before being subpoenaed to come here? A. Yes.

78 XQ. You don't make any claim that you were the person who sold the particular Millers Falls bench grinder that might or might not be involved in this action, do you? A. Would you repeat that?

79 XQ. Yes, I would be happy to. You don't make any claim that [12] you personally sold a bench grinder that might be involved in this particular action? A. No, I make no such claim.

80 XQ. You make no such claim, no. You say that the company sends name plates. You are talking of the practice that you know of, particularly right now. That is what you are doing as sales manager. You send name plates to this other company that manufactures bench grinders. A. Our firm does that, yes.

81 XQ. This other company doesn't put their name on it at all, the Hoover Company. A. No.

82 XQ. They just put the Millers Falls name on it. A. It is a stencil; a brass trademark which goes on the grinder itself with escutcheon pins.

83 XQ. With what? A. I call them escutcheon pins. You might call them tacks.

84 XQ. The only identified name on that grinder is Millers Falls. A. That is correct.

85 XQ. Does the bench grinder that you order from

Hoover Company now come to your plant's office in Greenfield, Massachusetts? A. Yes.

86. XQ. What sort of a container does it come in?

[13] Mr. DURKIN. Excuse me. I think a time should be specified in that question.

The COURT. I think you are referring to the present, are you, Mr. Reynolds?

Mr. REYNOLDS. Yes. I would be happy to stipulate this is what this man knows.

87 XQ. I am asking now as to what you know yourself right now. When this comes up there now, what kind of a container does it come in? A. In what would be considered a shipping container.

88 XQ. What is it made out of? A. They sometimes use wooden packing cases.

89 XQ. Wooden packing cases? A. Yes; and frequently they also use heavy shipboard or corrugated carton.

90 XQ. Is that something like Masonite? A. No, it is a number of plies of cardboard, I think you would call it.

91 XQ. How much would this grinding wheel weigh now? A. Bench grinder or grinding wheel?

92 XQ. How much does the bench grinder weigh when it comes to your place now in Greenfield? A. The shipping weight is approximately 80 pounds.

93 XQ. When that comes to your place at Millers Falls in Greenfield [14] now, what is done to it? You said, I think, it was stored for future sales: A. Yes, they go into what we consider our finished goods stock and when we receive an order for one, they are merely then stenciled, not on the inside but on—the outside of the shipping carton is re-stenciled and shipped out. The cartons, in other words, are never opened.

94 XQ. The carton in which you receive this machine, grinding machine from the Hoover Company is never opened by you, by your company— A. Never.

95 XQ. — at Greenfield, but it is stored there, is it? A. Yes.

96 XQ. —awaiting a sale for that particular model. A. That is correct.

97 XQ. And it is handled when it comes in by your employees. A. Yes.

98 XQ. It comes in by motor freight probably or freight — A. Ordinarily it would be motor freight.

99 XQ. Motor freight in Greenfield. There aren't too many— A. We have railroads.

100 XQ. Yes, I know, but you get most of your deliveries by motor freight from New Jersey. A. Yes.

[15] 101 XQ. That is where this Hoover Company is located, isn't it? A. Yes, it is.

102 XQ. You know that of your own personal knowledge? A. Yes.

103 XQ. And it comes in in a carton. It is taken off a motor freight— Do some of the Millers Falls employees unload the motor freight that contains these bench grinders? A. I cannot answer that.

104 XQ. But it gets unloaded in some fashion and gets into some warehouse or plant of the Millers Falls in Greenfield. A. Yes, and stocked.

105 XQ. And is it stocked by your employees; the physical thing? Is it placed in a certain warehouse by your employees? A. I would say Yes.

106 XQ. Does the bench grinder, to your personal knowledge, when it comes now, these days, from the Hoover Company in New Jersey by motor carrier, is it a complete outfit with grinding wheels already on it or emery wheels, or however you want to describe them? A. Yes, it is.

107 XQ. And you people don't open up the carton to make any examination to see whether or not a grinding wheel has been damaged in transit, for one thing, do you? A. No, we do not.

108 XQ. Then it is placed in a warehouse or a shop of some kind [16] of the Millers Falls awaiting future sales. We have covered that. A. Yes.

109 XQ. Then you get an order to ship one of those somewhere around the country. Right? A. Yes.

110 XQ. You go to this—either a wooden box or a heavy corrugated cardboard, ply cardboard, affair. A. Yes.

111 XQ. It is a pretty heavy box, isn't it? A. Oh, yes.

112 XQ. You go to that box that this bench grinder is in, that is completely set up, that has the Millers Falls name on this plate that has been attached to it with these escutcheon pins. Right? A. Yes.

113 XQ. Then you instruct your employees to—is that lifted up or put on some sort of a hand truck? A. Ordinarily it would be.

114 XQ. Put on a hand truck? A. Yes.

115 XQ. And it is pushed across the floor to some other motor carrier presumably. A. Yes.

[17] 116 XQ. Or could it also be shipped by what we used to call steam freight; but we don't have any steam engines any more so Diesel freight, we will call it? A. Yes.

117 XQ. Some are shipped by Diesel freight and some are shipped by motor carrier. A. That is true.

118 XQ. And your employees just take and put a new serial number on the outside. Whether it is a box or corrugated carton, you put a new serial number. A. No, we do not put any serial number on it.

119 XQ. You put some identification on it so that you can tie it up with the order you are sending out. A. It says on the end of the carton it is a Millers Falls number—76 or 77 or whatever the case might be—bench grinder. That is stenciled on the end of the box as we receive them.

120 XQ. As you get them from the Hoover Company? A. Yes.

121 XQ. And before they are stored away? A. That is correct.

122 XQ. In putting that stencil of the Millers Falls Company on that carton, your employees have to handle that carton which contains the bench grinder that already has on it [18] two emery wheels. Is that right? A. That is true.

123 XQ. And they have to tip that up on end if they are going to put the stencil on each end. A. Not necessarily. They can put it on the top.

124 XQ. Would you say that the general shape of the bench grinder as it comes to you from the Hoover Company is rectangular? A. Yes.

125 XQ. And is there any requirement that the Millers Falls trademark and number of the grinder be put on either end or the top or the bottom of it? A. Normally on the end of the carton it will say Millers Falls No. so-and-so bench grinder.

126 XQ. This is a pretty rough description, but assuming— It is simply rectangular in shape? A. Yes, sir.

127 XQ. The ends you are talking about would be right here and here. (indicating) That is right, isn't it? A. Yes.

128 XQ. And on these ends is where the emery wheels are. Inside, I mean. A. They wouldn't be as far out as the end of the box.

129 XQ. No, but they would be near the end of this. (indicating) A. Nearer the end than the center.

[19] 130 XQ. In other words, they wouldn't be near this side. A. Yes, they would be close to that too.

131 XQ. But they wouldn't be near the middle. A. No.

132 XQ. What makes it rectangular in shape is that the grinding wheel is longer one way than it is wide, isn't it? It is not merely square. A. No, it is not. It is rectangular in shape.

133 XQ. Do you ever see the workmen tip those cases up to put a stencil on, "Millers Falls"? A. No, that was done before we received them.

134 XQ. Who puts that on? A. The source from which we buy them.

135 XQ. Hoover Company? A. Yes.

136 XQ. That stencil on the end is put on by the Hoover Company then? A. That is correct.

137 XQ. And it is not put on by your employees— A. No.

138 XQ. —because when those cartons come to you, they contain the bench grinders that already have on the ends, "Millers Falls Grinder No. so-and-so." A. That is true.

[20] 139 XQ. Now we will get back again to when you are going to send out the order to a customer of yours. Is there any further stenciling done to that case, whether it is wood or cardboard, that this bench grinder has come in? A. Yes.

140 XQ. What do they do, Mr. Lyman? A. On the top of the rectangular case we would stencil the name and address of the customer and probably indicate his purchase order number.

141 XQ. And that is put on by one of your workmen? A. Yes.

142 XQ. Then after that it is hand-trucked to either a motor carrier or a Diesel carrier. A. It might be on a conveyor too.

143 XQ. Or a conveyor? A. Yes.

144 XQ. A conveyor is a series of metal rollers over which a continuous belt runs. Is that the idea? A. There is no belt.

145 XQ. Just the rollers? A. —that are used in shipping rooms for heavy cases.

146 XQ. They are a little inclined, aren't they? A. No, we just push this by hand from position to position.

147 XQ. It is loaded onto the freight and delivered to the customer. [21] A. Yes.

148 XQ. As far as you are concerned, you make no inspection of the machine that comes to you from the Hoover Company to see whether there has been any defect or flaws in it or anything. A. That is correct.

149 XQ. When you ship out a grinding machine, a bench grinder, with emery wheels already attached, you have to assume that it is all in first-class shape. A. That is true.

150 XQ. If there is, in fact, any broken wheel on that machine or if there is, in fact, anything wrong with the machine itself, that is something that is not discovered by you when you ship it. A. That would be true.

151 XQ. In fact, let me ask you one other thing, Mr. Lyman. Does the Millers Falls Company at Greenfield stock individual emery wheels of a 7-inch size? A. Presently, no.

152 XQ. Have they, to your knowledge, in the past? A. yes, we have.

153 XQ. Within the past five years whose emery wheels did they stock of a 7-inch size, to your knowledge?

Mr. DURKIN. If he knows.

The COURT. If he knows.

[22] A. We have purchased some from the Norton Company.

154 XQ. Where are they located? A. In Worcester, Massachusetts.

155 XQ. What is the color of their label? A. I can't tell you that.

156 XQ. While you were in Texas in 1952 would you have occasion to order emery wheels sent to your office or to your customers from the head office, so-called, in Greenfield? A. Yes, we offered them for sale but seldom sold any.

157 XQ. And the 7-inch grinding wheels that you had to do with in 1952 were made by Norton Company. A. Yes.

158 XQ. And Norton Company is located in Worcester somewhere. A. Yes.

159 XQ. You don't recall the color of the blotter that was on the Norton wheels that your company handled in 1952. A. No, I do not.

Mr. REYNOLDS. I think that is all, your Honor.

Redirect examination by Mr. Durkin.

160 Q. Mr. Lyman, the outline of practice, and so forth, that you have just told Mr. Reynolds, was that the same type of practice and procedure that was followed when you yourself were present physically at the Greenfield office of your company? [23] A. Yes.

161 Q. There wasn't, or was there any change in any of the details as you have outlined them? A. To the best of my knowledge, no.

162 Q. At that time was the stencil affixed by Hoover to these bench grinders? A. Yes.

The COURT. When you say at that time, what time do you mean?

Mr. DURKIN. (To the Witness). During the other percentage of the time you worked for the company 18 years, sir.

163 Q. Do I understand that the practice—the name plate was affixed at that time? A. Yes.

164 Q. This supply of emery wheels that you say you kept, or that was at Millers Falls, was that for a general sale or was that on a special order? A. It was what we classified as accessories, and sometimes some of our distributors would request a grinding wheel to go on some machine that they already had.

165 Q. But the practice, as followed by the Millers Falls Company, was that the container, as received by the Millers

Falls Company from the Hoover Company, was never disturbed in any way. [24] A. This is the bench grinder container?

166 Q. Yes, sir. A. No, never disturbed.

167 Q. Never disturbed in any way? A. Never disturbed.

168 Q. And as you told Mr. Reynolds, if the wheels were cracked, if there was anything wrong with the machine, you wouldn't even know that. A. That is correct.

169 Q. And the reason for that is you never opened the box, or the box was never opened. A. That is correct.

170 Q. This question of your being subpoenaed, did you ever talk to me about this case before you came in here today? A. Not before today.

Mr. DURKIN. Thank you, sir; that is all I have.

Recross-examination by Mr. Reynolds.

171 XQ. Mr. Lyman, in your redirect examination just now, if I understood you correctly, you said substantially that if one of your distributors requested a grinding wheel, which had become broken in some way,— A. Not necessarily broken; possibly worn out.

172 XQ. All right; worn out. Let's suppose we say if one of your disfributors requested a grinding wheel for any [25] reason, you would send him a Norton grinding wheel? A. Yes.

173 XQ. No question about that, is there? A. We have discontinued stocking wheels now but in those days we did carry a stock of various sizes and shapes.

174 XQ. Back in 1952 and 1953 you did have Norton wheels on hand for sale to your distributors if you were asked to send them. A. Yes, that is correct.

175 XQ. And that included the 7-inch grinding wheel or emery wheel, however you describe it. A. Yes.

176 XQ. And you know that of your own personal knowledge. A. Yes, I checked it. I asked our purchasing agent about that. That was before I came down here.

Mr. DURKIN. I will have to ask that portion of Mr. Lyman's testimony be stricken. If it is the report of a sales manager, I don't know whether or not it would be competent.

Mr. REYNOLDS. I am afraid we will have to strike it all. That is probably what the whole thing is.

That question hasn't been answered, has it?

(Answer to Question No. 176 read by reporter).

The COURT. What do you say, Mr. Durkin?

[26] Mr. DURKIN. I will withdraw it.

177 XQ. When you were in Texas, Mr. Lyman, around, say, from '52 and '53, do you have any recollection as to whether you ordered a grinding wheel for any of your customers; and that a Norton wheel was supplied to them in response to your request? A. I can't remember such an occasion.

178 XQ. But you don't deny that there could have been such occasions? A. Oh, no.

179 XQ. And you won't deny that if, when you were in Texas in 1952 and 1953, you had had a request from one of your distributors for a grinding wheel or an emery wheel, you would have sent him a Norton grinding wheel or emery wheel. A. Yes.

Mr. REYNOLDS. I think that is all, your Honor.

Redirect examination by Mr. Durkin.

180 Q. Mr. Lyman, it is a fact, is it not, sir, that if you placed an order with your home office for an emery wheel for a customer during the years as outlined by Mr. Reynolds, when you placed the order with the home office, the delivery would be made directly to the purchaser? A. Yes.

[27] 181 Q. And you wouldn't have any knowledge at all, would you, sir, just what wheel they sent him? A. No.

182 Q. Can you tell us—I think you said before that your company manufactures a grinder or a type of grinder aside from a bench grinder. A. That is true.

183 Q. Can you tell us whether or not that other type grinder, whatever it be, required an emery wheel on it? A. Yes.

184 Q. Can you tell us from your own knowledge and experience whether or not on those machines a Norton wheel was attached? A. Yes.

Mr. DURKIN. That is all. Thank you very much, sir.

Recross-examination by Mr. Reynolds.

185 XQ. I would like to clear up just one other thing, Mr. Lyman, with regard to this so-called re-re-direct, I guess it would be, when Mr. Durkin asked you if a customer ordered a wheel, that, of course, the wheel would be sent directly from the home office to the distributor. A. Yes.

186 XQ. In the course of your work as a district sales manager [28] for that region did you have to call on distributors? A. Oh, yes.

187 XQ. Did you ever see any wheels in your distributors' places of business that had been ordered from your home office? A. No.

188 XQ. You never saw any. Then what was the basis for your saying to me that you believed that they were Norton wheels if you didn't actually see some wheels that had been ordered by some of your distributors occasionally? A. Those wheels that we have ever stocked, or those that we did stock were Norton wheels.

189 XQ. The only wheels you ever heard of your company having in stock were Norton wheels. A. That is correct.

Mr. REYNOLDS. That is all.

Mr. DURKIN. Thank you, Mr. Lyman.

---

[29] JOHN P. BRADY, Sworn.

Direct examination by Mr. Durkin

1 Q. Mr. Brady, can you tell us, please, what is your occupation? A. I am a chemist and chemical engineer.

2 Q. In the pursuits of either or both of those activities can you tell us whether or not you have had any experience in the testing of stresses and strains? A. I have.

3 Q. Briefly, if you will, sir, will you tell us what your experience consists of? A. During the period of years from 1929 I have been the owner and director of the Edel Laboratories in Newark, whose background and business entails the analytical, physical, and the micro- and macro-examination of those materials that are necessary to evaluate stresses and strains that have been formed on them.

4 Q. Can you tell us whether or not in the furtherance of that you have had any experience specifically in the testing of strains and stresses and akin tests to emery [30] grinding wheels? A. During that period of time?

5 Q. Tell us about all the time, if you will. A. There has been submitted to our laboratory, in which I conducted the examinations, all types, all sizes.

6 Q. Included in that type, can you tell us whether or not any of these wheels were wheels known as vitreous wheels with a grit or a grain of aluminum oxide? A. Yes, some of them were vitreous wheels or ceramic wheels.

7 Q. Tell the jury, Mr. Brady, when you say ceramic just what you mean. A. A ceramic wheel is one that is made up essentially of those minerals of the earth that in their fusion creates the bond that holds the wheel or the particles together.

8 Q. And have you had any experience in examining a finished product of that particular type in a grinding wheel? A. I have.

9 Q. Are you familiar or have you conducted any types of tests to find if there be any types of defects or flaws in such type wheels? A. I have.

10 Q. And you say you have been doing such work since what year, approximately? A. Since 1929.

[31] 11 Q. Are you presently doing that type of work? A. I am.

12 Q. Can you tell us what, if any, degrees you hold? A. I hold a degree of chemical engineer of Newark College of Engineering. I have a Bachelor of Science in chemistry from Seton Hall College. I have taken post-graduate work in physics and chemistry at the Brooklyn Polytechnic Institute, Columbia University, New York U., C.C.N.Y., and Massachusetts Institute of Technology.

13 Q. In those graduate studies that you have pursued, Mr. Brady, can you tell us whether or not the studies of stresses and strains were involved? A. In the background of the engineering studies that I have made stresses and strains and other properties of physics were constantly being employed and studied.

14 Q. You have not, or have you ever been employed actively by any manufacturer of any type of grinding wheels? A. Yes, I would say not essentially in the capacity as revolves about the manufacture of the wheel, but for other work that was necessary, that was required by their plants.

15 Q. Actually you have never been actively associated in the manufacture of any wheels. A. No, I have not.

16 Q. Can you tell us the types of tests that you are familiar [32] with, which tests are applied to, specifically, emery grinding wheels with a bonding agent of a ceramic nature and a cutting or abrasive agent of an aluminum oxide

nature? Can you tell us what types of tests you are familiar with to see whether or not that finished product is a complete and flawless product?

Mr. REYNOLDS. I object, your Honor please.

The COURT. May I have the question, please?

(Question No. 16 read by reporter)

The COURT. Now, Mr. Reynolds, what is it?

Mr. REYNOLDS. Perhaps we can step up—

(Conference at the bench between the Court and counsel as follows:)

Mr. REYNOLDS. Well, the point of my objection, Judge, is that up to this time there is no proof of any wheel manufactured by The American Emery. There is no proof of what the wheel looks like, whether it was vitreous, ceramic, or resinoid, or what type it was. There is nothing upon which this expert should be privileged to testify at this point. It is premature. There is no testimony in here that there is, in fact, a wheel belonging to this defendant.

The COURT. What do you say to that?

Mr. DURKIN. As far as the question of whether or [33] not it be a resinoid wheel or whether or not it be a ceramic wheel, Mr. Darby testified in detail yesterday concerning the type of wheel he supplied to the Hoover Company in 1952.

The COURT. Did he testify specifically that in 1952 the defendant supplied any type of wheel to the Hoover Manufacturing Company?

Mr. DURKIN. Four or five times, sir. The Court has a notation in its notes there concerning the year 1951.

The COURT. From Darby?

Mr. DURKIN. Yes, sir; and then I think the Court changed it from 1951 to 1952.

The COURT. I have this testimony in regard to Darby: That he was works manager in 1952. But I am frank to say I haven't—and there is general testimony by him that his company made and sold wheels to Hoover at some time. But there is no definite testimony, as I recall, in the year 1952 the defendant sold any type of wheel to Hoover. Can you find that? What do you gentlemen say?

Mr. REYNOLDS. Just general testimony.

Mr. REID. Just general testimony.

Mr. REYNOLDS. And even if there were, there is no testimony from anybody from Hoover to testify American [34] Emery Wheel was their sole source of supply. And, of course, this is just a speculation of the third degree, I would say, if he is permitted to go ahead to speculate because the defendant here sold stuff to Hoover and because somebody from Millers Falls says Hoover manufactured it, therefore, they used our wheel. I don't think that follows at all.

The COURT. Is there evidence at the moment in this record that the actual emery wheel which exploded was an emery wheel with a binding agent of a ceramic nature and a cutting or abrasive agent of an aluminum oxide nature?

Mr. DURKIN. No, sir; there is not. But I will represent to the Court that I have Hoover's man en route. He will be here to testify this morning. Secondly, I represent to the Court that I will prove through the various witnesses that have testified, and those to testify, that the question the Court just asked will be answered. In addition to that, the Court has a note because I remember the Court making the change, acknowledging the change in the Court's notes yesterday. The Court had the year 1951 down.

The COURT. As being the date of the accident?

Mr. DURKIN. No, concerning parts of my testimony [35] directed to Mr. Darby. I asked Mr. Darby specifically whether or not the components, the ingredients in a 6-, 7-,

and 10-inch wheel that was supplied in 1952 to the Hoover Company were exactly the same; and he answered Yes. And I said the only difference in those wheels, of course, is the diameter; and he says Yes and he says the core. That was Mr. Darby's testimony. And based upon that, if nothing else, the present question to this witness is proper.

The COURT. I am frank to say that depending solely on my recollection I am not clear in my mind whether there was any testimony by Mr. Darby that during the year 1952 these wheels were sold by The American Emery Wheel Works to Hoover Manufacturing Company.

Mr. DURKIN. Ask Mr. Reynolds and Mr. Reid what their recollection is.

The COURT. Assuming that is in the record, I think this: That in any case the order of proof isn't fixed. In other words, some latitude has to be allowed. If I have assurance from counsel that this particular testimony is going to be tied up or connected with testimony to the effect that this defendant did in 1952 sell and deliver to Hoover wheels of the type described; namely, a wheel with a 7-inch circumference, 5/8-inch [36] bore, 1-inch thickness, made with an abrasive agent of aluminum oxide and a binding agent of a ceramic nature, it seems to me that the evidence is proper. It has got to be connected up, however; and if at the proper time the plaintiff has failed to connect this evidence, I will entertain a motion to strike the testimony. I have to depend, as the trial proceeds, upon assurances of counsel that when the opportunity arises he will present the evidence. We can't do three things at once, as a practical matter.

Mr. DURKIN. I will so represent to the Court, that I will have a representative from Hoover here.

Mr. REYNOLDS. So much for that, as far as that goes. My position is it even goes farther in that this particular wheel, there has got to be evidence of it somewhere, that it

was our make. So far there is nothing to tie this with The American Emery Wheel Works.

The COURT. In the last analysis, of course, it will be incumbent upon the plaintiff to establish that the wheel which caused the plaintiff's injuries was made by this defendant. That is an essential element of the plaintiff's case.

Mr. DURKIN. Yes, sir.

(Conference at the bench concluded)

[37] Mr. DURKIN. May we have the question read?

(Question No. 16 read by reporter)

A. Yes.

17 Q. Will you tell us that test or those various tests, Mr. Brady, if there be more than one? A. In a vitrified wheel where the bonding agent makes a definite compound we call the grain structure, where the bonding agent embodies each individual component in each grain of the wheel itself, the first examination would be a visual inspection for heat cracks or strain cracks.

18 Q. For what type— A. Heat cracks or strain cracks.

19 Q. At what time in the process would that examination be made? A. That should take place just before the wheel is set up for its spin test. The spin test is a test that you set it on the spindle and run it at its critical speed or above its critical speed for 2 to 5 minutes and see if any disintegration takes place, and—

20 Q. Excuse me. A. —and after the spin test in many cases where the fine hair cracks are present, cracks that would not necessarily break up at those speeds, you give it a ring test.

The COURT. Ring?

A. (Continued) You ring the wheel with a mallet. That is [38] known to the person that is able to understand the ring of the wheel so that any flaws or cracks that would be

within it would pick up that ring and you could identify it as being something wrong with the wheel.

21 Q. When you mention about the grain and the bonding agent, if the grain particles or the grit, each grain was not completely covered by the bonding agent, can you tell us what would occur?

Mr. REYNOLDS. I object to that. There is no testimony in this case so far that each grain— We don't know what wheel we are talking about.

The COURT. Granted.

Mr. REYNOLDS. There is no testimony in this case upon which to base any such assumption, and no offer on my brother's part that he will prove any grains in any wheel were not properly bonded.

Mr. DURKIN. It is a most difficult task in any explosion case to prove the type of grain and the condition of the grain after the explosion. There just isn't anything.

Mr. REYNOLDS. If I may say a word on that point. This isn't necessarily an explosion case. We have only heard the testimony of one man whose response to a leading question called it an explosion. The wheel hasn't [39] been proffered, what remained of it. No description of the wheel has been given. I don't think we are bound to take my brother's description of explosion. It could be a lot of other things happened to that wheel. There is no description of what the wheel looked like afterwards so far. I don't understand an expert has a right to assume facts which are not in evidence and where there is no assurance upon which such facts will be proved to base an opinion.

Up to this point, I respectfully submit, there isn't any testimony along the line that has been assumed in this question.

Mr. DURKIN. I will say to the Court I do not intend to be able to prove any such fact. I will rely solely upon the cases which interpret the plaintiff's right in the types of

proof to be submitted as a reason for the breakage of the particular wheels involved.

The COURT. I think technically the objection is good insofar as the form of the question is concerned. I will sustain it on that ground.

22 Q. Mr. Brady, when a ring test is given, you say a certain sound is emitted. Is that correct? A. That is true.

23 Q. And that sound would be foreign to the sound that would be [40] emitted from a wheel which was imperfect. Is that correct?

Mr. REYNOLDS. I object to that technically only. This man is an expert. This is a leading question to an expert.

The COURT. I think it is. Suppose you reframe the question.

Mr. DURKIN. I will reframe it, sir.

24 Q. Can you tell us, Mr. Brady, is there any difference between the sounds emitted in the type of test you have just mentioned between various types of wheels? A. Yes, there is.

25 Q. Will you tell us what they are, sir? A. In the examination of a wheel you give it the ring test. There is a true sound that every wheel reverberates that is different in each wheel. But in particular wheels of the same construction it is similar, and a trained observer can tell immediately by the sound that comes back from ringing that wheel whether something is wrong or not with it.

26 Q. When you say the sound comes back detecting something is wrong with it, can you tell us what there would be to cause the emitting of such a sound?

Mr. REYNOLDS. I object to that at this stage for [41] the same reason. Up to this point there is no proof that there was anything wrong with any wheel. We haven't had any evidence so far connecting up any wheel with this defendant. I object at this point.

The COURT. That is true. And as I have indicated to counsel, the question of order of proof is something that of necessity must vary with the convenience of counsel and availability of witnesses, and I think it is a matter where the Court in its discretion has to rely on assurances of counsel. I will allow that question.

Mr. DURKIN. May we have the question read?

(Question No. 26 read by reporter)

A. The factors that would involve a sound return in ceramic material would be anything that would tend to absorb the true noise of the wheel itself. Those things can be change in density over this structure of the matrix of the wheel. It can involve cracks. It can involve materials that would cause voids or unconnected linkage between the bonding material and the particles themselves. And these are critical elements in ringing a wheel.

27 Q. Will you tell us what the matrix of the wheel is, Mr. Brady? A. That is the composition of the wheel as it is completely mixed together, so that is the cohesion of the particles or a single unit when the wheel is finished.

[42] 28 Q. You used the word, "voids." Tell us what you mean by a void and tell us what the causes of voids in these particular wheels are.

Mr. REYNOLDS. I object. I don't want to labor this.

The COURT. That is quite all right.

Mr. REYNOLDS. I would object to this. There is no testimony of any voids in any wheels before us.

The COURT. I will allow the question. Objection overruled.

A. In the composition of mixed material of a nature such as we have here, where there is coarse material, fine material, and then limpid material—that is material that would flow—and you mix them together and you put them through

a heating process. If the material is not completely milled so that it is uniform throughout and it is put into its form before it enters the oven and then it passes through the oven and sinters it, in the roasting process the sintering of the material would tend to pull apart and leave voids. The degree of those voids would be according to the way the material had been mixed and according to the various mixtures of the ingredients that had gone into it. It also would be a part of the way they had cooled in certain sections of that mixture. That [43] is when it is not truly a homogeneous mix.

29 Q. I think you have told us about the effect or the end result of a ring test to a wheel which contains such a void. A. Yes. I indicated to you that in the passage of the sound through the wheel, it would tend to break in that period and give a different resonance to the ear of the experienced tuner.

30 Q. Applying our questions and answers temporarily, Mr. Brady, to the spin test, I think you said—and it has been testified—that the spin test is a test in which a wheel is put on an arm of a motor and it goes a certain amount of r.p.m.'s per time of interval. Now can you tell us whether or not the mere fact that a wheel being tested is put on a spindle or an arm and rotated at a speed three to four times the speed that is to be recommended for the use of that wheel—can you tell us whether or not that type of test will in and of iself detect any flaws, if there be any flaws, in the wheel being tested?

Mr. REYNOLDS. I object to that. For an expert he can answer that Yes, which isn't much of an answer from an expert. I think the question is in improper form. He should be asked what are the results of the spin test. I [44] thought we had already been through that. This question is a leading question. All he has to do is say Yes and the question is answered. I object.

Mr. DURKIN. Mr. Reynolds, I respectfully submit, can cross-examine on any point he thinks I am improperly questioning the witness on.

The COURT. That is true. But may I have the question, Mrs. Archambault?

(Question No. 30 read by reporter)

Mr. REYNOLDS. He also has two questions in it.

The COURT. That is a little involved.

Mr. DURKIN. Shall I withdraw it?

The COURT. Suppose you simplify it.

31 Q. The spin test, Mr. Brady, we have been talking about, and so forth, tell us what it does. A. In the case of the spin test all of the particles that the wheel revolves about a spindle have a force of motion outward, away from the center of the wheel, and each individual particle in that wheel has that force exerted upon it to throw it out. If there is a crack that is not a part of the body of that wheel, when the wheel goes above its critical speed, that wheel will tend to part at that crack and be thrown apart. And the idea of the spin test is essentially to find out whether that [45] condition exists in a wheel, and the operator usually protects himself very thoroughly against the condition by masking it under some suitable coverage.

32 Q. Are you familiar or have you ever given a particular spin test to these types of wheels? A. I have given the spin tests.

33 Q. Can you tell us whether or not there is a distinction between applying to a wheel this particular spin test and applying to this wheel the intended force or intended use in actual industry?

Mr. REYNOLDS. I object to that because of my brother's use of the word, "this" wheel.

The COURT. "A" wheel would be better.

Mr. REYNOLDS. The question could be read as if there were some wheel presented to this witness.

34 Q. So there will be no objection here or on the record, Mr. Brady, I am not referring to any one specific wheel; I am referring specifically to a 7-inch emery wheel, the components of which consist of a ceramic bond and an aluminum oxide grit. Is there any misunderstanding on that, Mr. Brady? A. No, there is not.

Mr. DURKIN. (To the Witness) May I have the question answered now, sir?

[46] Mr. REYNOLDS. I would suggest he rephrase the question so there won't be any argument at any time.

The COURT. I think the original question with the substitution of the word, "a," would have been a simpler way of doing it.

Suppose you read the question back to the witness substituting the word, "a," for the word, "the."

Mr. REYNOLDS. I think he used the word, "this."

(Question No. 33 read by reporter as follows:

"Can you tell us whether or not there is a distinction between applying to a wheel this particular spin test and applying to a wheel the intended force or intended use in actual industry?")

A. Yes.

35 Q. Will you tell us what that is, sir? A. A wheel that is spinning freely—the strains or the stress that may be operative within the intrinsic matrix of that wheel will vibrate and if they are of such a nature, will weaken it and disintegrate it. If within the same matrix there are other conditions, such as a void that we described here a short time ago, or such as unconnected pieces of either the alundum oxide or the sintering clay, they would not effectually be disturbed by the spinning of that wheel. But when added

forces were applied to that wheel so that the strain became [47] unbalanced through those areas, then they would tend and could tend to weaken the wheel and cause it to fracture. In, fact, on the outside periphery of the wheel this occurs many times.

36 Q. In addition to that, Mr. Brady, can you tell us whether or not any heat is generated by, first of all, just the wheel spinning on a spindle? A. Very little but some is.

37 Q. Is the degree of heat increased or decreased, depending upon the length of time the wheel is in operation? A. Yes, the heat would be increased.

38 Q. Increased. Can you tell us whether or not much heat is generated in a 2-minute spin test? A. Well, there is very little heat generated in a spinning wheel that has no work being done upon it.

39 Q. Can you tell us whether or not, Mr. Brady, heat as an agent has any effect upon the structure of an emery grinding wheel? A. Heat as an agent, of itself, has an effect on any type of a grinding wheel.

40 Q. Coupling heat with any type of agency that is being applied to the periphery of that wheel, can you tell us whether or not there is a distinction upon the effect of the wheel that has run for a time, say 5 or 10 minutes, [48] and the effect upon that same wheel when it is given a spin test unaffected by any foreign agent?

Mr. REYNOLDS. May I have that question, please?

(Question No. 40 read by reporter)

Mr. REYNOLDS. I don't understand that, your Honor. I object to that on that ground.

Mr. DURKIN. I didn't get the grounds.

Mr. REYNOLDS. I don't understand it.

The COURT. Suppose you simplify it. I think the Court has your idea. Maybe it can be made a little simpler.

41 Q. Mr. Brady, when a wheel rotates on the spin test there are certain effects imputed to that wheel. Can you tell us whether or not that effect upon that wheel is the same effect as the effect on that wheel after it has been running for a period in excess of 10 minutes, and which wheel has a foreign agent or some type of appliance being applied to the periphery of that wheel? A. Yes, I can.

42 Q. Will you tell us what that is, please? A. In a free spinning wheel, which we described previously, the amount of heat that is engendered at its periphery or through the entire body of the wheel is, of necessity, very small. When you apply a force to the periphery of [49] that wheel, you tend to create friction between the two bodies. And depending—according to the hardness or density of the force that you are applying there, the heat can vary over quite a wide space of degrees. That can produce a wheel from what might be considered a fairly cold running wheel to one that would be very, very hot, so hot that you couldn't touch it. And naturally the crystal structure in that wheel of both the aluminum oxide and the new ceramic material, that has worn the bond between those particles, vibrates according to the heat that is set up in there.

43 Q. In the spin test of 2 minutes is there any effect upon the crystallization of the ingredients of that wheel? A. Very little; some.

44 Q. When the spin test is being administered to this type of wheel, I understand you to say that the vector force or the direction of the force runs from the core to the periphery. Is that correct? A. That is right.

45 Q. That also is true when the wheel is in actual operation. A. That is true.

46 Q. Can you tell us in which direction the vector force or stress goes when there is some type of agent applied to the periphery of that wheel? [50] A. According to the force that is applied, each reaction has its own force that

gives a counter reaction, so under those conditions, and describing the parallelogram of forces, the opposite effect would be produced into the wheel itself, setting up the friction that I described previously and causing the counter effect upon the surface of the particles within the wheel.

47 Q. Is there any such counter effect applied to this wheel when a spin test is given? A. No, there is not.

48 Q. Can you tell us, Mr. Brady, if you are familiar with any other types of tests besides the spin test and the ring test? A. There are other types of tests that are used under certain conditions in which you pick up the sonic vibrations within the wheel that would indicate the voids and fissures that might take place. There is also the means of visualizing the complications that would occur in the cross structure of the wheel by the X-ray analysis. And then the typical sectional examination that is peculiar to the laboratory itself and which we are doing at all times on this wheel involves the micro- and macroscopic examination of it.

Mr. REYNOLDS. I move the word, "this" wheel in [51] that answer be stricken on the ground of possible confusion because there is no wheel before the witness.

Mr. DURKIN. I will consent to it being withdrawn.

The COURT. It may be withdrawn. There is no wheel before the witness.

49 Q. Now, Mr. Brady, assume, if you will, that I had here a wheel manufactured by The American Emery Wheel Works of Providence, Rhode Island, and I gave you that wheel and I asked you to apply whatever chemical tests you were familiar with to that wheel, could you tell me after your tests whether or not that wheel was manufactured by The American Emery Wheel Works of Providence, Rhode Island?

Mr. REYNOLDS. I object. In the first place, there is no wheel before the Court that was involved in this accident

and I don't believe we are interested in any other wheel of the countless others that may have or may not have been made by this defendant or by any of the other—not the defendant—people who make emery wheels. I think it is going to be confusing to the jury. It is not going to serve any purpose in this case particularly when so far the responsibility of this defendant, The American Emery Wheel Works, has not been tied up to the wheel that Whit Mason said he was working on on February 10, 1953.

[52] The COURT. I understand that. But as I comprehended the question, it is merely a question directed to this man as to his ability to identify a wheel being manufactured by the defendant.

Mr. DURKIN. That is correct, sir.

The COURT. In other words, it was in the nature of a preliminary question as to the capacity or ability of this witness to make identification.

Mr. DURKIN. That is correct, sir. Well,—I think we had better talk at bar.

(Conference at the bench between the Court and counsel as follows:

The COURT. Will you please read the question, Mrs. Archambault?

(Question No. 49 read by reporter)

The COURT. I don't quite comprehend that question.

Mr. DURKIN. Here is the purpose of the question.

The COURT. You are assuming something.

Mr. DURKIN. I don't think I am assuming anything.

The COURT. Your question says—

Mr. DURKIN. I agree. Well, I will rephrase whatever type of question you want. I want to know from this witness if I took one of the wheels of this defendant and handed it to him, any wheel at all, whether or not this [53] witness

could, by chemical or any type of tests, specifically say to me, "This wheel is a wheel of this defendant and is not a wheel of any other defendant" or "of any other manufacturer;" not "defendant," of course.

Mr. REYNOLDS. He hasn't qualified to that ability. Stresses and strains are all he said he studied so far.

Mr. DURKIN. He has a degree in chemical engineering and other degrees. He so testified.

The COURT. If this is what you are endeavoring to ask the witness: "If I were to show you an emery wheel, could you by any test determine by what person or firm that wheel was manufactured," without reference to this defendant or any particular manufacturer,—

Mr. DURKIN. I will adopt that question.

Mr. REYNOLDS. He hasn't presented any alleged qualifications to limit it to that.

Mr. DURKIN. I will do that if that be necessary but he has already testified he has a degree in engineering and chemical engineering. He has a degree in chemistry from Seton Hall. I will go into it.

Mr. REYNOLDS. He has to explain what the test is. I don't think it is relevant anyway.

The COURT. Once again, in these questions of the [54] qualifications of an expert there is considerable latitude, and the objection in the last analysis goes more to the weight to be given to the opinion than it does to its admissibility. I think, frankly, the defendant's objection—Also, you were making a certain assumption in the question I don't think you should make at this stage. If he has the ability to look at an emery wheel and say who manufactured it,—

Mr. REYNOLDS. Without knowing in advance where it came from; just a blank wheel.

Mr. DURKIN. Be glad to. That is all right.

(Conference at the bench concluded)

50 Q. Mr. Brady, did I understand from your qualifications that you have a degree in chemical engineering? A. That is right.

51 Q. And that you have a Bachelor of Science degree from Seton Hall University? A. That is right.

52 Q. Mr. Brady, can you tell us whether or not, if an emery wheel of this particular nature was given to you, could you by any types of tests, by looking at this particular or that particular wheel, tell us, as a result of those tests, who manufactured that particular wheel?

Mr. REYNOLDS. I object, your Honor please.

[55] The COURT. Now what is the objection?

Mr. REYNOLDS. This is a new question that has been asked, and I would like to have my objection noted to this question. He keeps talking about "this" and "that" wheel. That is in this question. I want it to appear that there is actually no wheel before this witness.

The COURT. I think perhaps, Mr. Durkin, if I may make a suggestion: "If you were shown any emery wheel of the size of 7-inch circumference, 5/8-inch bore;" "any emery wheel." I think that will do it.

53 Q. Any emery wheel containing the components which are under discussion here. Do you understand the question? A. I do.

Mr. REYNOLDS. If there have been some amendments, for fear I might lose my rights, I would like to object to the question as amended.

The COURT. Objection overruled. If you understand the question, Mr. Witness, you may answer it.

The WITNESS. I do.

Mr. DURKIN. Will you tell us your answer to that, please?

A. (Continued) The only thing I could tell you about a wheel that would be submitted to me for physical and chemical examination was its physical and chemical characteristics.

[56] 54. Q. When you excised or extracted from any wheel that you analyzed, can you say from that result whether that or any wheel was manufactured by "A," "B," or "C" Company?

Mr. REYNOLDS. I object for the same reason.

The COURT. Objection noted and overruled.

Mr. DURKIN. Do you understand the question?

The WITNESS. I do. I am just trying to compose my own thinking on it.

A. I could not say in the examination of any wheel that was submitted to me as a wheel who the manufacturer of it was.

55 Q. Can you tell us why you could not tell us or tell from the examination of any wheel who its manufacturer was?

Mr. REYNOLDS. I object again.

The COURT. Objection noted; overruled. All right.

A. The manufacturer of a wheel can make a wheel that would duplicate in certain characteristics wheels of many companies. Unless I had specifically their product in my hand to make the comparison both physically and chemically, I could not relate it to any manufacturer—the wheel that I had in for the analysis.

56 Q. Could you tell us, Mr. Brady, whether or not for you to say any wheel was manufactured by "X" Company, would you have to know what the formula used by "X" Company was?

Mr. REYNOLDS. I object. This one I object for [57] the additional ground the witness has already testified from a physical and chemical analysis of any wheel he could not tell who the manufacturer was. That is his testimony. I object, therefore, for that additional ground.

The COURT. Objection overruled.

A. I would require either some of their properties or their formulations.

57 Q. You mentioned before, Mr. Brady, about a test concerning—I think you mentioned a sonic test. Was that it? A. That is right.

58 Q. Tell us how a sonic test is applied to a wheel, if you will, please. A. A sonic test is a means of setting up within the wheel reverberations that can be read and indicate changes in the structure of the wheel.

59 Q. Are these indications manifested on a machine of any sort? A. On a dial reading, yes.

60 Q. Have you ever seen one of these sonic machines? A. I have.

61 Q. Have you ever actually been present when they were being used? A. Yes, I have seen it used.

62 Q. According to the dial, which is the result of sounds being [58] emitted into that wheel, tell us what the dial indicates. A. That would be actually what happens. What is indicated is when the responses reach certain depths, it is picked up and registered so it can be noted. Or in the case of a wet needle it can register on a graph, showing that over a transposed face you will get certain readings. If there is any changes in it, the variations will show on there. If it is uniform, it will have a uniform reading throughout the entire field.

Mr. DURKIN. I think that is all, Mr. Brady. Thank you.

Cross-examination by Mr. Reynolds.

63 XQ. Mr. Brady, you say you came from Newark? A. Newark, New Jersey.

64 XQ. New Jersey. A. Yes.

65 XQ. And you were acquainted with Mr. Durkin, who also comes from Newark, before coming to court, were you? A. I was.

66 XQ. Have you testified for Mr. Durkin in other cases involving emery wheels? A. I have never testified for Mr. Durkin before.

67 XQ. Have you ever testified concerning emery wheels before, before today? [59] A. I may have testified concerning emery wheels before today, yes.

68 XQ. Did you testify for the plaintiff, the person who is attempting to seek damages, or for the defendant, the person who is alleged to have made or sold the wheel? A. I beg your pardon?

69 XQ. I say did you testify for the plaintiffs who were seeking to collect damages, or did you testify on behalf of the defendant in those previous cases, who either made it, distributed it, or sold the wheel? A. It could be either way.

70 XQ. What is your present recollection? A. It would be either way.

71 XQ. Can you recall any particular case— Now what is the latest time before today that you appeared in a case involving an emery wheel in any court in the United States? A. I honestly don't know.

72 XQ. It could have been one year ago or ten years ago. Is that right? A. It could have been, say, one year ago or five years ago.

73 XQ. You haven't any present recollection of anything about testifying in any particular case for the past five years. A. The only reason—in any particular case?

74 XQ. Concerning emery wheels. [60] A. Well, the only reason I am a little bit nonplussed on it is because of the amount of work in this field that varies through testing wheels and other material, and I can't justifiably say when I did appear in court and testify on an emery wheel case.

75 XQ. I am not asking you to give us the precise day of the week, date of the month, or even year. I am just asking you to give us your best recollection as to whether you testified in an emery wheel case within the past six months, the past year, year and a half, or two years; whether it was in New Jersey, Georgia, or Saskatchewan, or wher-

ever it was. Don't you have any recollection of a matter of that point? A. The only reason I don't have a recollection on it is that most of the emery wheels, when you are finished with them, it is so conclusive one way or another that they don't go any further.

Mr. REYNOLDS. I move that answer be stricken.

The COURT. It may be stricken.

76 XQ. The question is a simple question. You understand what I mean when I use the words, "appear in court"? A. That is right.

77 XQ. I didn't ask you about testing things in your laboratory. I asked you about your appearance personally in court. [61] You do understand that, don't you? A. I do understand it perfectly.

78 XQ. The next question is when was the last time you appeared in a case involving emery wheels; approximately now? A. I will guess. I will say within a 2-year period of time.

79 XQ. In what state of the United States or Canada did you appear to testify? A. New Jersey.

80 XQ. Have you ever testified in any emery wheel case outside of the State of New Jersey prior to today? A. I may have testified in Pennsylvania but I am not certain.

81 XQ. Within the two years or beyond the two years? A. Beyond the two years.

82 XQ. You are not certain whether you testified in Pennsylvania beyond the two years. A. That is right.

83 XQ. In this case that you say you have some recollection of testifying in within the past two years in New Jersey, did you testify on behalf of the plaintiff who was seeking damages or did you testify on behalf of the defendant who was either the maker, distributor, or vendor of the wheel? A. It would probably be the maker.

84 XQ. It would probably be. Don't you have any better recollection [62] than that as to whether it would probably be or it was? A. No, I don't.

85 XQ. Do you appear in court so frequently, Mr. Brady, that you can't recall and separate the emery wheel cases from some other cases that you come into court on? A. That is right.

86 XQ. Are you in court practically every week somewhere in the United States testifying? A. More than— Probably twice a week or three times a week.

87 XQ. Twice a week or three times a week you are in court testifying somewhere. Is that right? A. Well, that is right.

88 XQ. Do you testify for plaintiffs and defendants? A. Whoever brings the work to the laboratory.

89 XQ. And the name of this laboratory is what, please? A. Edel Laboratories.

90 XQ. Is that E-d-e-l? A. That is right.

91 XQ. What is the location of that? A. 18 Green Street, Newark, New Jersey.

92 XQ. Do you know Whit Mason, the plaintiff in this case? A. Who?

93 XQ. Whit Mason,— A. No.

[63] 94 XQ. —the plaintiff in this case. A. I do not.

95 XQ. Have you ever talked with Whit Mason in preparing this case for trial? A. No, sir.

96 XQ. You have talked with Mr. Durkin prior to today? A. I have.

97 XQ. How many times did you talk with him, approximately? A. About the case probably twice. I have talked to him about appearing over the telephone many times.

98 XQ. They had a bench grinder here for the edification of the jury a couple of days ago. Did you ever see a bench grinder in talking with Mr. Durkin about your anticipated testimony in this case? A. I did not.

99 XQ. You don't know who Whit Mason is? A. No. I do not.

100 XQ. Did Whit Mason or Mr. Durkin present you with a wheel which they informed you was the part or fragments of a wheel that had caused an injury to Mr. Mason?

Mr. DURKIN. Objected to as being completely immaterial. It would be hearsay as far as the witness is concerned.

Mr. REYNOLDS. It is a basis for establishing his opinion, your Honor.

[64] Mr. DURKIN. His opinion as to what?

Mr. REYNOLDS. As to what he has testified to here today.

Mr. DURKIN. I think his testimony was completely independent of any one entity.

Mr. REYNOLDS. I don't think it is quite that independent.

The COURT. I will allow the question. It may be answered Yes or No.

(Question No. 100 read by reporter)

A. Yes.

101 XQ. Where are the fragments that were presented to you by Mr. Durkin and represented to you to have been the fragments of the wheel which has allegedly caused the injury to Mr. Mason? A. Where they are right now?

102 XQ. Yes. A. I suppose they are in the custody of the lawyers; I don't know.

103 XQ. You keep some records at your laboratory, don't you, Mr. Brady? A. I do.

104 XQ. Do you have some records with you this morning that will help the jury to determine when, on what date, fragments [65] of an emery wheel were submitted to your laboratory? A. I do not.

105 XQ. You do not have any. Do you have the records with you today? Is that what you say? A. I do not have any records with me today on this case.

106 XQ. Do you have any records in your laboratory in

New Jersey that would show the date when the fragments of this wheel were presented to your laboratory for examination? A. Yes, I believe there would be records there.

107 XQ. You believe there would be records there, but you didn't bring them with you to Rhode Island today. Is that what you want us to understand? A. Well, I wouldn't bring those records per se, unless it involved the analysis, to court anyhow.

108 XQ. You wouldn't bring the records per se unless it involved the analysis. Well, now, Mr. Brady, did you come to court here today with no record whatever to use to refresh your recollection? A. That is right.

109 XQ. Not a single paper on you that you could refer to to refresh your recollection about what you know in connection with anything in this Whit Mason's case. A. That is right.

110 XQ. Well, now, will you give the Court and jury the benefit of [66] your best recollection, Mr. Brady, as to the approximate time when parts of an emery wheel were presented to you at your laboratory for examination? A. Suppose I say within 1956. Would that be satisfactory?

111 XQ. Well, what we want is your best recollection. A. That is my best. I can't give you the month or the day, but it was within the year of 1956.

112 XQ. Today, the date you are testifying, is May 29, 1956. A. That is right.

113 XQ. Was this wheel presented— Could it have been presented, according to your best recollection, some time in 1955? A. If it were, it was very close to '56.

114 XQ. And who presented it to you? A. Mr. Durkin.

115 XQ. The counsel for the plaintiff sitting here? A. That is right.

Mr. DURKIN. At this juncture I am going to have to object to each and every specific question that is directed to this witness concerning any activity that took place be-

tween this witness and myself pertaining to any rock or any emery wheel, based upon what I represented that wheel to be, as being completely immaterial and hearsay as far as this witness' testimony is concerned.

The COURT. Objection overruled.

[67] 116 XQ. Now when these fragments of the wheel were presented to you, Mr. Brady, they were left at your laboratory for some period of time, I presume. Were they? A. No, they were brought in and I examined them and they were taken away.

117 XQ. All the same day? A. Probably overnight.

118 XQ. Probably overnight? A. Yes.

119 XQ. Well, now, to the best of your recollection, will you try to indicate on this piece of paper here— Do you have a pencil, Mr. Brady? A. I have a pen.

120 XQ. Will you please indicate on that pad of paper the approximate size of the fragments—if there was more than one that you examined—that were presented to you by Mr. Durkin? A. Oh, I would be purely guessing. I wouldn't even like to evaluate them unless I saw them again.

121 XQ. You would be purely guessing? A. Yes.

122 XQ. As to the approximate size of the fragments of an emery wheel which were presented to you by Mr. Durkin. Is that your answer? [68] A. That is right.

123 XQ. Therefore, do you decline to attempt to make a rough sketch of the approximate size of the pieces of an emery wheel that were presented to you by Mr. Durkin? A. I couldn't do it. I wouldn't even— Unless I saw a piece or pieces of it so I could relate it to the wheel again, I wouldn't want to take the chance of trying to draw a diagram like that.

124 XQ. If you had brought your records with you today, Mr. Brady, that are now reposing in New Jersey, would they have assisted you in being able to recreate the approximate size of these fragments? A. The only thing

that they would have done for me at that time was possibly to place the date that the wheel was brought to the laboratory.

125 XQ. You mean your records in New Jersey would not disclose the approximate size of the fragments which were presented to you by Mr. Durkin? A. I made no report on this case whatsoever.

126 XQ. You made no report on this case whatsoever. But you did examine the fragments that were presented to you, did you not? A. No. When you say examine, that is the reason I did not make a report. I didn't give them judicious examination.

[69] 127 XQ. You didn't give the fragments judicious examination. Did you use any or all of the so-called fragments that were presented to you by Mr. Durkin in any chemical test to determine the component parts of the fragments that you had received? A. I did not.

128 XQ. Did you perform any ring test with any of the fragments that were presented to you? A. I did not.

129 XQ. Did you perform any sonic test with any of the fragments that were presented to you? A. I did not.

130 XQ. What test, if any, did you perform on these fragments that were presented to you by Mr. Durkin?

Mr. DURKIN. Is it the Court's understanding that my objection continues? I don't want to interrupt.

The COURT. There is no need of reiterating it, Mr. Durkin. To this general line of inquiry your objection has been received, noted, and overruled.

Mr. REYNOLDS. Would you like to have the pending question read?

The WITNESS. No, I know fairly well what you asked me.

A. In examining the wheel, I examined it microscopically and [70] macroscopically.

131 XQ. What is the other? A. That is examining it by looking at the fragments.

The COURT. Macro—

The WITNESS. Macro- and microscopically.

132 XQ. How do you spell the macro? A. M-a-c-r-o.

133 XQ. Did I interrupt you? You had finished, had you? A. That is right.

134 XQ. In other words, this macroscopic is just looking at it with your naked eye. Is that the idea? A. Or with my glasses on.

135 XQ. But ordinary reading glasses, nothing with any super power like a jeweler, gemologist, when he squints at a diamond; just your regular reading glasses. A. That is right.

136 XQ. Then you took a microscopic view, you put them under a microscope, the fragments. A. Put them under a low power microscope; yes, sir.

137 XQ. You say you made no report to Mr. Durkin on what you found. A. There was no report to be made. The examination was never finished; never got to a state where I could make a report.

138 XQ. Why? Because they were withdrawn from your care? A. I guess during the period of time they couldn't let me [71] study them long enough.

139 XQ. The reason then why you didn't make all of these tests that you have talked to us about today is because they didn't leave the fragments of the wheel with you long enough to make them. That is right, isn't it? A. No, that is not so. In fact, the tests that I described today would not be made on sections of a wheel; they would be made on a whole wheel.

140 XQ. All but the spin test could be made on fragments of a wheel, couldn't they? A. No, they would all be made on a whole wheel.

141 XQ. I will ask you another question. Whatever tests you had intended to make when the fragments of the wheel had been presented to you by Mr. Durkin, you did not complete all of the tests that you had intended to make because the fragments were withdrawn before you had a chance to make them. Is that right?

Mr. DURKIN. Objected to if I may. There has been no testimony this witness ever intended to make any additional tests other than the ones he has just outlined.

The COURT. I may have misunderstood the witness. I thought a moment ago he said he didn't complete his tests because the fragments were not left with him long enough. Maybe I misunderstood the witness.

[72] Mr. DURKIN. I will withdraw it.

Mr. REYNOLDS. Let's have that read.

(Questions Nos. 137 and 138 and Answers read by reporter)

The COURT. I will allow it.

142 XQ. So there were tests you intended to make on these fragments if they had left them with you long enough. A. I would have made an exhaustive study of the wheel.

143 XQ. You would have made? A. Yes.

144 XQ. Future. You didn't have the time actually to make exhaustive tests because they withdrew the specimens, the fragments, before you could do it. A. That is true. The time I wanted to make the test in, they couldn't let me have the stone that long.

145 XQ. Whether they could or couldn't, you wouldn't know, would you? All you would know was that they didn't actually leave them with you long enough. A. They said they couldn't. That was the reason.

146 XQ. That is what they told you? A. Right.

147 XQ. You didn't attempt to find out why, did you? A. I wasn't interested.

148 XQ. Will you tell us just briefly, Mr. Brady, what tests you had intended to perform upon the fragments of the wheel [73] that had been submitted to you by Mr. Durkin? A. I would have made chemical and physical measurements of the wheel.

149 XQ. By chemical, what would that embrace? What would you have done in a chemical way? A. Break down the composition of the material itself.

150 XQ. Dissolve it with some sort of acid? A. May not; may use a spectograph and probably get enough information out of that.

151 XQ. What is that, Mr. Brady? A. That is a machine that would tend to give me the value of the elements that were in the composition of the wheel. And from that I may be able to evaluate the matrix of it.

152 XQ. Well, the matrix; you mean the composition of it. A. The way it is formed in its different separate components.

153 XQ. Just like the matrix of a cake consists of the flour and the eggs and the sugar and salt. Is that a plain example? A. Before it was cooked you are talking about; I am talking about after it was cooked.

154 XQ. After it is cooked it is a cake. A. It is a cake. To analyze the wheel, I was interested in.

155 XQ. You were trying to break down the component parts of the wheel so you could say there was aluminum oxide in here, [74] there was clay or ceramic. Is that what you intended? A. That could be a good part of the work.

156 XQ. What more did you expect to get out of this? A. I would tend to get the other physical properties, its density and its relationship of the different materials that were in there to the bond.

157 XQ. The relationship of the different materials to the bond. What does that mean, please, in plain English? A. The bond is the material they use to sinter the aluminum

oxide and join it together. And in that bond there can be many materials, many foreign materials, that could be of value in the analysis of a wheel of this kind. It may not, also, be of value too.

158 XQ. Was there any label on these fragments of this wheel that you saw, Mr. Brady? A. By label—I don't know.

159 XQ. You have no recollection of any label? A. I don't know that there was a label on it.

160 XQ. You don't have any recollection of reading any words on any part of the fragments of the wheel? A. No, I don't recollect any markings on the wheel at all that I saw.

161 XQ. That is the only one I am asking you about, the fragments [75] of the wheel that you saw, Mr. Brady. There were no markings of any kind, no words written out that you could read on the fragments of the wheel that were presented to you by Mr. Durkin. A. If I remember correctly, I didn't see any markings on the piece of wheel given to me.

162 XQ. By markings we mean either figures or words, letters. You recall neither figures— A. I can't relate the wheel to any markings.

163 XQ. Of any kind. A. Yes.

164 XQ. Whether they are words, letters, or figures. A. I am not able to relate it to any memoranda at all.

165 XQ. Then you certainly have no recollection of seeing anything on the fragments of the wheel that was presented to you that would indicate by whom that particular wheel had been made. A. No, I didn't try to find out by whom it was made.

166 XQ. You didn't try to find that out? A. No.

The COURT. We will take our usual recess at this point. Mr. Witness, you are under cross-examination. You will not discuss this case with anyone during the recess.

(Recess)

[76] Mr. REYNOLDS. I have no further questions of this witness.

Redirect examination by Mr. Durkin.

167 Q. I just have one or two, Mr. Brady, if I may. Did I fully understand you in cross-examination, Mr. Brady, to say that it was impossible for you to have performed a spin test with whatever it was that was submitted to you? A. I could not.

168 Q. Is it also true that you could not perform a ring test? A. I could not.

169 Q. Is it also true that it was impossible for you to perform a sonic test? A. That is right.

170 Q. Is it also true, sir, that even if you anticipated or wanted to make any type of chemical test or analysis of that wheel, without that formula that you testified to before you couldn't tell whether or not the specimen that was under consideration was manufactured by any company, could you?

Mr. REYNOLDS. I object. It is a leading question.

The COURT. I think that is so, Mr. Durkin.

Mr. DURKIN. I will reframe it, sir.

171 Q. Can you perform with results a chemical analysis of any [77] specimen and say it is a specimen of any manufacturer without first knowing the manufacturer's formula?

Mr. REYNOLDS. I object again. This is an expert witness. He ought to be able to handle himself.

The COURT. In the interest of economy of time, the witness has already testified substantially to that effect. I will allow it.

A. I could not.

Mr. DURKIN. Thank you, sir; that is all I have.

Mr. REYNOLDS. I have no further questions, your Honor.

The COURT. That is all, Mr. Brady.

The WITNESS. Thank you.

ROBERT MORTON, *Sworn.*

[284] *Cross-examination by Mr. Reynolds.*

127 XQ. Mr. Morton, you are presently employed by the Hoover Company? A. No, sir; I am presently employed by Kingston Conley, Incorporated.

128 XQ. You were employed by the Hoover Company in 1952? A. That is correct.

129 XQ. On the question of interest the Hoover Company is being sued by Mr. Mason for this same injury, isn't it?

Mr. DURKIN. Objected to as being completely immaterial, totally incompetent to be answered by this witness.

Mr. REYNOLDS. There is a great deal of interest of an employee of a defendant sued by the same plaintiff in another jurisdiction.

The COURT. I think you would have to go a little farther than that, Mr. Reynolds. I will sustain the objection on the showing at the moment as to this man's knowledge.

130 XQ. Mr. Morton, do you know that Mr. Whit Mason is suing the Hoover Company in the United States District Court for the District of New Jersey?

Mr. DURKIN. Excuse me. I am going to object to any such testimony being read in the presence of this [285] jury under the present Court's ruling.

The COURT. I think, Mr. Durkin, it would seem to me, No. 1, depending on what the extent of this witness' knowledge is—I don't want to make any unnecessary pronouncements. You will understand why.

Mr. DURKIN. Yes, sir.

The COURT. You understand the subject of that qualification.

Mr. DURKIN. Yes, sir; and my objection is based at this juncture on the testimony as it has been adduced.

The COURT. I will allow that question and see where that brings us. Objection is noted and overruled.

Do you understand the question, Mr. Witness? Will you please read the question, Mrs. Archambault?

(Question No. 130 read by reporter)

A. Officially I do not know or did not know. There has been a lot of conjecture and talk, but I know nothing officially at this point.

131 XQ. Officially or unofficially have you heard the matter of the suit discussed at the plant, at the Hoover Company plant? A. I have heard some talk about it, yes.

132 XQ. You do know that there is a suit pending by Whit Mason [286] against the Hoover Company?

Mr. DURKIN. My objection is to continue to all of these questions, sir.

The COURT. Objection noted and overruled.

A. I have heard talk of it, yes.

133 XQ. You have heard talk of a suit by Whit Mason against the Hoover Company? A. That is correct.

134 XQ. And you worked for the Hoover Company in 1952, didn't you? A. That is correct.

135 XQ. You have already testified to that. A. That is correct.

136 XQ. In 1952 there was a so-called Kingston Conley Division of the Hoover Company. Wasn't that the setup? A. That is correct.

137 XQ. In other words, the Kingston Conley Division was owned by the Hoover Company in 1952. A. That is correct.

138 XQ. And the Kingston Conley Company, you said, you work for now. A. That is correct.

139 XQ. It is a separate corporation? A. Yes, sir; there have been two sales since the time that you are speaking of.

[287] 140 XQ. Is it still owned by the Hoover Company? A. No connection whatsoever.

141 XQ. How do you know that? A. I know the present owners.

142 XQ. You know the present owners? A. That is correct.

143 XQ. When did that separation take place, in what year?

Mr. DURKIN. Which one is this now? I understand there are two.

A. There was a—

The COURT. Are you referring to the Kingston Conley?

Mr. REYNOLDS. Yes, your Honor.

A. (Continued) The present owners purchased the plant—I don't know the exact date but I would say somewhere in the neighborhood of February of this year.

144 XQ. 1958? A. That is correct.

145 XQ. How long was the Kingston Conley Division a part of the Hoover Company? A. Approximately from 1946 until 1955.

146 XQ. Until 1955. Now one other thing: You have talked with Mr. Durkin before coming to court here today about the extent of your knowledge of this matter, haven't you? A. Yes, sir.

[288] 147 XQ. How many times have you talked with him approximately? A. I believe twice. Not counting phones or anything else, twice.

148 XQ. You talked with him about that even though you knew that Whit Mason was also suing your former employer, the Hoover Company? A. That is correct.

149 XQ. How far is New Jersey, that part of Newark where— Do you come from Newark? A. No, I come from Plainfield.

150 XQ. How far is Plainfield from the City of Providence? A. I can tell you. I just drove up. It is 219 miles.

151 XQ. And you are out of reach of a subpoena of this court and you had to come here voluntarily. You couldn't be compelled to come. You know that, don't you? A. That never was mentioned or anything else.

152 XQ. You didn't know whether you could be compelled or not? A. No.

153 XQ. You didn't inquire as to whether you would have to come by subpoena? A. No, I did not.

154 XQ. You didn't want to testify, in view of the fact that this same Whit Mason was suing a company you were working for in 1952, that you wouldn't come unless you were subpoenaed. You didn't say that. [289] A. No.

155 XQ. You volunteered to come and help the plaintiff, Whit Mason, out in the case of American Emery Wheel, didn't you? A. I volunteered information that I knew. Mr. Durkin asked me.

156 XQ. Then you volunteered to come today, didn't you? A. That is correct.

157 XQ. Who is paying your expenses? A. I would imagine my company.

158 XQ. You would imagine your company. Don't you know? A. They are the ones I work for. I am not there today.

159 XQ. Did you take it up with your superiors as to whether you could leave the premises to come here and cooperate with Whit Mason in the trial of this case?

Mr. DURKIN. I will have to object to that phase of it. He is here at the request of the plaintiff's attorney.

The COURT. I think the question is somewhat objectionable.

Mr. REYNOLDS. I will amend the question

160 XQ. Did you take up the matter with your immediate superiors at the company you are presently working for, whether you could come here to Providence today to testify in this case? A. I did.

[290] 161 XQ. And have you been— Have your expenses been offered to you by any representative of the plaintiff to take care of your travel and expenses while you are here? A. No.

162 XQ. They haven't. And you say there is no connection between the company you presently work for and the old Hoover Company? A. None whatsoever.

163 XQ. Mr. Morton, in 1952 when you worked for the Hoover Company, there was no record kept as to what company's grinding wheels went on these bench grinders, whether they were Universal or American. That is right, isn't it? A. That is correct.

164 XQ. No doubt about that. A. That is right.

165 XQ. No records were kept. A. That is correct.

166 XQ. I presume that this Kingston Conley Company is still in business. That has something to do with grinding as of the present day. A. Oh, yes.

167 XQ. Let me ask you this: Is the Kingston Conley Company that you are presently working for today a competitor of the Hoover Company? Do you still make the same kind of things? [291] A. No, we are not a competitor of the Hoover Company.

168 XQ. Who is making these bench grinders today, your Kingston Conley Company or the Hoover Company? A. We are; Kingston Conley.

169 XQ. Hoover Company gave them up? A. That is correct.

170 XQ. They don't compete with you on these bench grinders. Is that right? A. That is correct.

171 XQ. Does that affect your interest in your testimony today, the fact that the company you now work for is the only one of the two previous outfits that are making these bench grinders? Does that influence your testimony in one way or another? A. No, it does not.

172 XQ. Did the company that you work for now, Kingston Conley Company, when it took over the manufacture of these grinders, agree to your knowledge to assume any outstanding liability that the Hoover Company might have incurred for the previous manufacture of these bench grinders?

Mr. DURKIN. Objected to, sir.

Mr. REYNOLDS. If he knows.

Mr. DURKIN. Objected to even if he does know.

[292] Mr. REYNOLDS. If he knows, he should be compelled to answer.

The COURT. I will allow the question. If he knows, he may answer.

The WITNESS. Might I have the question?

(Question No. 172 read by reporter)

A. To my knowledge I don't know. I couldn't answer that. I really don't know.

173 XQ. You couldn't say Yes and you couldn't say No. A. I couldn't say either way; yes.

The COURT. We seem to have reached our customary luncheon hour here, Mr. Reynolds. We will stop here until two o'clock.

* * * * * * * * *

174 XQ. Mr. Morton, I am showing you a wheel which has been marked as Exhibit No. 2 for identification. In the first place, that wheel is not the type of wheel that would be on this bench grinding machine that is in front of the jury, is it? A. It is not the same size wheel; no, sir.

[293] 175 XQ. And it is not the size wheel you would put on that bench grinder when you send it out either, is it? A. That is correct.

176 XQ. What kind of a grinder would this fit? A. ¼ horse.

177 XQ. That is a smaller machine than in front of you. A. That is correct. That is ½ horse.

178 XQ. The machine that is in front of the jury is a ½ horse. A. ½-horse grinder.

179 XQ. This wheel, Exhibit No. 2 for identification, would never be placed on this machine that is marked Exhibit No. 3 for identification, would it? A. That is correct.

180 XQ. What is the correct name of this Universal: Universal what? A. "Universal Wheel and Abrasive Corporation" is what it says.

181 XQ. To your knowledge they haven't always used this so-called red background with white printing, have they? A. That is correct.

182 XQ. They have used others with a white background. A. That is right.

183 XQ. Mr. Morton, do you know whether the Universal Wheel and Abrasive Corporation in Chicago, Illinois, is still in business? A. I don't believe they are.

[294] 184 XQ. You don't believe they are. When did they go out of business? A. I don't know the date.

185 XQ. Have you the approximate time? Was it a year ago, two years ago, three years ago, four years ago? A. To my recollection, I have no date at all in mind; but just as a recollection, I would say anywhere between one year and two years ago. I really don't recall exactly.

186 XQ. This being 1956, probably Universal went out of business either in 1954 or 1955, to the best of your recollection. A. That is correct. I can only go on purchases we have made. I know of no official date.

187 XQ. I will show you a blotter and ask you to look

at it and tell me what that is. A. That is a blotter from Norton—no, not Norton; Universal Wheel and Abrasive Corporation, Chicago, Illinois.

188 XQ. Is that the same company you just told me whose name was on this Exhibit No. 2 for identification? A. That is correct.

189 XQ. What kind of a blotter is that? How would you describe that blotter, blue and white? A. Blue blotter with white lettering.

190 XQ. And that is Universal Wheel and Abrasive Corporation of [295] Chicago, Illinois, isn't it? A. That is correct.

191 XQ. Ever see any botters on any of the wheels while you were working for the Hoover Company that looked like this? A. No, sir; none at all.

192 XQ. Did you ever see any before that looked like this? A. I have never seen that label or anything like it.

193 XQ. Never saw this label before? A. No, sir.

194 XQ. That is what it says on there, isn't it? A. That is correct.

195 XQ. And it has recommended speed, r.p.m.'s. A. Yes, it has on that one, yes.

196 XQ. And you say to your knowledge or to the best of your knowledge they have been out of business since either '54 or '55. A. To the best of my knowledge. I have no date, sir

197 XQ. That is blue and white, isn't it? A. That is correct.

Mr. REYNOLDS. I would like to have this marked for identification, your Honor.

The COURT. It may be marked Defendant's A for identification.

(The exhibit is received and marked for identification)

[296] 198 XQ. Mr. Morton, in your experience in connection with the manufacture of grinding wheels do you have any knowledge as to about how many companies there are who make grinding wheels of a 7-inch diameter similar to the one that is on that grinding machine that is in front of the jury box? A. I have no idea.

199 XQ. You know there are more than one or two in the country, don't you? A. Absolutely.

200 XQ. Would you have any recollection as to whether there might be 25, 50 or 75? A. I would have no idea as to how many there were. I have never investigated for any reason.

201 XQ. Do you know that there are other grinding wheel companies that have blue and white labels other than this one you have just seen? A. I think I have seen some others, yes.

202 XQ. Some other companies with blue and white labels? A. That is correct.

203 XQ. When I say other companies, I mean companies that are not either the Universal Wheel and Abrasive or The American Emery Wheel; I mean in addition to the American and Universal you have seen blotters on grinding wheels from [297] other companies that were blue and white, haven't you? A. That is right.

204 XQ. Now, Mr. Morton, this morning you made some reference to the side of the rest on the machine that is in front of the jury, did you not? A. That is correct.

205 XQ. And you talked about that would be used if you were grinding on the side of a wheel, did you not? A. If you had any reason to grind on the side: that is correct.

206 XQ. Does your company subscribe to the general safety principles that are published by the Grinding Wheel Institute with regard to the care that the operator should use in using your machines? A. Yes, I would say so.

207 XQ. Perhaps I misunderstood you; that is why I

am going to ask you again. Did you say something this morning about putting into the box in which this table grinder is placed some instructions regarding the use of this machine when it is sent out? A. They are instructions only on voltage, hookup, and the properties we are interested in, not particularly the use of the unit itself; lubrication, and so forth.

208 XQ. I show you what appears to be a safety guide for grinding [298] wheel users as published by the Grinding Wheel Institute. Would your concern that manufactures this grinding machine and puts it in an original carton, seals it up,—would you place one of those in there for the assistance of the operator of that grinding machine as to what he should be doing?

Mr. DURRIN. Objected to. I think it is improper. The question at issue is whether or not it was done, not whether or not it should be done.

Mr. REYNOLDS. I will amend the question. I thought I asked whether he did.

209 XQ. When these machines were shipped in 1952, you testified this morning, I believe, that your company, the Hoover Company, placed the machine in a box of some kind. You said it might be wood or it might be cardboard with a wooden base, with other reinforcements here and there. Is that right? A. That is correct.

210 XQ. This carton or box, whatever it was that you encased this machine in, would be a thing in which this machine could be transported from one place to another. That is the purpose of putting it in a box. A. Absolutely.

211 XQ. When you sent these machines out in 1952, did you place [299] one of those suggestions or a similar list of suggestions— A. I don't believe we did. I don't believe we do now.

212 XQ. You don't believe you did? A. No.

213 XQ. Your company, does it specialize in the manu-

facture of grinding machines only or does it make other kinds of mechanical contrivances? A. It is just part of our units, the grinders.

214 XQ. Is it a large part or medium part or a small part? A. I would say it was a small part.

215 XQ. Small part. Getting back to this question of the Hoover Company in 1952, what about the Hoover Company? Were they principally a grinding machine manufacturer? A. No, the same as now.

216 XQ. What else do they make besides grinding machines? A. Fractional horsepower motors.

217 XQ. They make motors? A. That is correct.

218 XQ. When this machine, you say, was made by the Hoover Company, is it a fair statement to say that the Hoover Company probably had some other concern mold these guards and rests and the base; and that all that was manufactured by Hoover was just the motor? Is that a fair statement? A. No.

[360] 219 XQ. You have a foundry there? A. As such, no. The castings have to be made at an outside foundry's source; that is correct.

220 XQ. These castings, that is what you call the guards and the rests? A. That is right.

221 XQ. They were not manufactured by Hoover? A. That is correct.

222 XQ. You bought them from some other company? A. That is correct.

223 XQ. What company did you buy those from? A. We have several foundries. We have a foundry in Paterson, New Jersey, which is Latham Foundry. We have one in Pottstown, Pennsylvania. We have another one in Oswego, New York. It could be any one of those.

224 XQ. They are independently owned? A. That is correct.

225 XQ. And you purchased these castings, represented as guards here and the rests, from other foundries? A. That is correct.

226 XQ. What about the base on which this motor is? You probably have that casting made by some other foundry too, don't you? A. That is correct.

[301] 227 XQ. All that you people make is the motor? A. No, we have to do a job on the parts. We have to do operations; drilling, boring, machining, and so forth, of all the castings. We buy only raw castings.

228 XQ. You buy raw castings and you polish them up and put the holes in them where they should be and places for the bolts and nuts. A. And machining operations that are necessary internally also on the castings.

229 XQ. But fundamentally the castings are made by outside sources? A. That is correct.

230 XQ. Then you assemble the job, so to speak? A. That is right.

231 XQ. Do you actually make the motors or do you get them, too, from some other supplier? A. No, we wind the stator.

232 XQ. Your experience, however, has been chiefly connected with grinding wheels and machines, hasn't it, your particular job? A. My particular job at the time we are speaking of was in charge of all the quality of our products, incoming and outgoing.

233 XQ. Well, now, in 1952 you were the chief inspector. A. That is correct.

[302] 234 XQ. Did you inspect other component parts for other machines that you people made? A. Everything; yes, sir.

235 XQ. What other appliances or machines or articles did your company manufacture at that time in '52? A. Well, as I said, a variety of fractional horsepower motors, from ¼-horsepower motors even up to integrals which run

up to 3-, 4-, 5-horsepower for pumps and other applications.

236 XQ. Floor pumps? A. For pumps, hoists, any applications.

237 XQ. You mean the motor. A. We make the motor.

238 XQ. Did you assemble any other product other than grinding machines? A. We assembled the motors.

239 XQ. After you got the motors did you put your motors on any other product other than grinding machines at your plant and sell them? A. No, not as such, no.

240 XQ. Was the grinding wheel the only product that your company made?

Mr. DURKIN. Objected to, sir. There has been no testimony that this company made any grinding wheels.

Mr. REYNOLDS. My choice of words is unfortunate. [303] I will withdraw the question.

241 XQ. This grinding machine, was that the only full-fledged product that your company made that was sent out as one piece to be used? A. Basically; yes. There was one other item that the Hoover Company put on the market back, I believe even before 1952, which was a saw and grinder attachment—a motor, as such, with a saw and grinder and other attachments. Basically, that is the unit as we put it out.

242 XQ. Basically, that is the unit? A. That is the unit.

243 XQ. Mr. Morton, you know from your experience connected with grinding machines that there is a special type or kind of a grinding wheel that is made where it is intended that grinding shall be on the side of the wheel, isn't there? A. Absolutely.

244 XQ. Absolutely. And this wheel that is on the machine in front of you now is not the type of wheel that is specially made for side wheel grinding, is it?

Mr. DURKIN. Objected to as being immaterial as to

what this particular wheel is made for. If Mr. Reynolds wants to submit a wheel of his company and ask that question, I think it would be proper.

[304] The COURT. What do you say to that, Mr. Reynolds?

Mr. REYNOLDS. I don't think it makes any difference what company it is. It is this type of wheel that was involved, that Whit Mason says he was using. It is that type of wheel. That is what my question is directed to. That type of wheel is not the type of wheel that you would use if you were going to do side grinding. That is the question. It doesn't make any difference whether it is ours, Norton's, Universal's, half a 'dozen others'.

The COURT. If the witness knows, he may answer.

A. Basically, that is correct. You would not use this for 100 per cent side grinding.

245 XQ. You would not use that type of wheel for 100 per cent side grinding. The type of wheel you would use for side grinding would be much wider on the peripheral surface, wouldn't it? A. That is correct.

246 XQ. It would probably be anywhere from two to three times as wide as this present one. Is that right? A. That is right.

247 XQ. And it wouldn't be solid. You could put your finger in from the outside toward the face of the wheel, couldn't you? [305] A. That is correct.

248 XQ. Mr. Morton, will you look at that wheel that I have handed you and tell me whether or not that is the type of wheel that is used for side grinding? A. Yes, I believe you would use this to some extent in toolroom applications, and so forth.

249 XQ. Would it be used for side grinding? A. Not being an expert on wheels, I wouldn't want at this point to say whether it could or could not. I really don't know.

250 XQ. Have you ever seen a wheel of that same general shape before today? A. Yes.

251 XQ. What was the wheel that you saw of that same general shape before today used for?

Mr. DURKIN. I object to this line of questioning. If this witness does answer what it was being used for, then, of course, we have to know what the use was at that time, whether it be proper or not.

The COURT. Is that quite accurate? The witness indicated in direct examination, as I recall his testimony, that there was a portion of this rest which could be employed by the operator for side grinding of an object. Now I take it Mr. Reynolds' purpose is to show [306] that the type of wheel incorporated in the grinder is not used for side grinding; that there is a different type of wheel for such a purpose.

Mr. DURKIN. As I understand Mr. Reynolds' question, he is asking this witness what this witness observed when this witness saw this particular type of wheel in operation. That presupposes, sir, if I may, that the use this witness observed was a proper use, and we don't know whether or not it was.

The COURT. I think there is some merit in that, Mr. Reynolds. However, I think you can inquire of the witness if he knows whether or not the type of wheel which you are showing him is the type of wheel customarily employed for side grinding.

Mr. DURKIN. I have no objection to that.

Mr. REYNOLDS. Very well.

252 XQ. I will ask you that question. Is it? A. Yes, sir.

253 XQ. This side rest that you talked about this morning is on there, in case you have a proper wheel for side grinding on there, to rest your tool on, isn't it? That is what the purpose of that extension of the rest around the corner is for. Isn't that right? A. It could be used for that, yes.

[307] Mr. REYNOLDS. I would like to have this marked for identification, your Honor.

The COURT: It may be marked Defendant's B for identification.

(The exhibit is received and marked for identification)

254 XQ. Mr. Morton, this morning you stepped down from the witness chair in front of the jury box and you indicated that if you were grinding a tool on the outside periphery of this wheel that is on this machine, you would hold the tool somewhat in that fashion, resting it on the rest like that. (indicating) Isn't that right? A. Not particularly.

255 XQ. Would you just do it again? Please be careful; this is a pen. Don't stick it—

Mr. DURKIN. Just a second. I have to object to any type of illustration by this witness unless it be specifically understood as to what type of tool he is holding, as to the angle, and so forth, he is holding it. Of course, the manner in which he would do it would depend on the type of tool he would be utilizing at the time.

The COURT. Didn't he give us some demonstration this morning?

Mr. REYNOLDS. He did, at the request of counsel.

[308] The COURT. Didn't he employ your pen or pencil this morning?

Mr. DURKIN. Pointing to the area and the rest. I don't want any misunderstanding as to the angle these witnesses are using. If that would be understood, I would have no objection.

Mr. REYNOLDS. He did more than just point to it; he placed the pen on the rest this morning.

256 XQ. Didn't you? A. Yes.

257 XQ. You placed it on the rest. Take that pen I have

handed you from the courtroom table here and put it on the rest in such fashion as would be used if you were going to use that wheel to sharpen it. A. This, of course, is all understood this all has to be adjusted to the size of the wheel you are using. As such, you would adjust it accordingly. Basically, if you are going to grind, you would lay it across here and use that surface in front.

258 XQ. You wouldn't take and hold it this way to grind it, would you? (indicating) A. No.

259 XQ. Mr. Morton, this machine, as it now appears before the jury, has a piece off it. What is that piece called? [309] A. In our terminology that is the guard cover.

260 XQ. That still leaves the machine with the guard cover off, and the guard cover attaches to the side of the machine. Would you say that is a fair statement? A. That is correct.

261 XQ. That still leaves something on top of the wheel as it revolves, doesn't it? A. That is right.

262 XQ. May that be taken off? May that guard be taken off this machine? A. It is possible.

263 XQ. How would you do it? A. There are Allen screws, two Allen screws on the end, one here and one there. (indicating)

264 XQ. An Allen screw is a screw that the head is sunk in? A. That is right.

265 XQ. You wouldn't use a wrench to take it out? A. You would use an Allen wrench to remove that screw.

266 XQ. And an Allen wrench is a peculiar kind of a wrench, isn't it? A. That is correct. It is a many-sided wrench that fits down in the socket.

267 XQ. Is this hexagon here, six sides? (indicating) A. Yes.

[310] 268 XQ. It is a piece of steel that has got six sides on it? A. That is correct.

269 XQ. That fits in that hole? (indicating) A. That is correct.

270 XQ. And then it comes up straight and then it has at right angles a short piece of steel also. A. They come in various sizes.

271 XQ. Various sizes? A. That is correct. They have "T" handles and they also come as a standard purchased item in the hardware store, as you have described.

272 XQ. You put an Allen wrench in there and you can attach to that a regular monkey wrench type and turn that screw, can't you? A. That is correct.

273 XQ. There are two of them there, aren't there? A. That is correct.

274 XQ. To take that guard off you would what, remove this nut that holds the flange? A. You would have to remove that.

275 XQ. Next thing is you take off the emery wheel. A. That is correct.

276 XQ. After that you remove these two Allen screws and you can take the whole guard right off. [311] A. After removing the inner flange also.

277 XQ. Is that held in there? A. No, it is held by the outside nut.

278 XQ. The inner flange is held by the pressure exerted by this outside nut against the flange of the outside, against the wheel, against the inner flange. A. Against the shoulder.

279 XQ. And against the shoulder. A. That is correct.

280 XQ. So it is possible to take this entire guard completely off the machine, is it not? A. That is correct.

281 XQ. By doing those operations. Take off this nut, pull off the flange, lift off the wheel, slide off the next flange, and then just loosen these two Allen nuts, and the whole guard comes off. Right? A. That is correct.

282 XQ. After that guard is off the machine, you can then take the flange that is on this shaft, put it on, then you can put the wheel on, then you can put this other flange on, then take the nut and tighten it up, and you can run this machine without the guard on it, can't you? A. You can, yes.

283 XQ. In other words, there is no safety contrivance built into [312] this machine that prevents an operator from running this machine when the guard has been removed and when the rest has been removed. A. There is none required on any piece of equipment such as that. That piece of equipment is Underwriter approved, both here and I believe also in Canada. As we send it out, it has those safety features on it.

284 XQ. But as I said, there is nothing built into this to prevent it from being operated when this guard has been taken off. A. Nothing.

285 XQ. When the guard has been taken off, these flanges can be put on the wheel, the other flange, the nut tightened up, turn on the juice, and that grinding wheel will revolve at 3600 revolutions without any guard on it, won't it? A. That is correct.

286 XQ. Do you put any literature in the box with this grinding machine cautioning persons not to remove the guards when they are doing any work? A. I don't believe we do, no.

287 XQ. You didn't then anyway in '52, to the best of your recollection. A. I don't believe we did, no.

[313] 288 XQ. You probably don't now. A. I don't think so.

289 XQ. Mr. Morton, I think you said that you would subscribe to this safety code of the Grinding Wheel Institute, having to do with the use of grinding machines. Perhaps you would like to have a minute. I would like to have you read what is in there, if you care to.

Mr. DURKIN. I will have to object to this without first knowing what the purpose of it is.

The COURT. What is the materiality of some code such as this, Mr. Reynolds?

Mr. REYNOLDS. Well, it sets up—it is evidence of a standard of care on the part of the persons operating, universal usage or generally accepted usage.

Mr. DURKIN. How is that to be proven by this witness?

Mr. REYNOLDS. He is the man who makes them. He ought to be able to tell how they ought to be used.

Mr. DURKIN. Anything this man might do or think certainly is not imputable to the plaintiff in this action.

Mr. REYNOLDS. I don't care whether it is imputable. We are just asking the man who makes the machine what are the capabilities of the machine, what it can do, what it can't do, what you should do and shouldn't do [314] with it.

Mr. DURKIN. That is entirely distinguished from what he is being asked now.

The COURT. It strikes me, Mr. Reynolds, that is somewhat removed from being shown a document prepared by some third party, and he is, in effect, being asked to pass judgment on that document. You seem to be inquiring whether he agrees with what someone has said in that document.

Mr. REYNOLDS. I will withdraw it temporarily.

The COURT. I think the objection is good.

290 XQ. Mr. Morton, if a bench grinding machine that has on it already emery wheels, as you have indicated that is the way they send them out of Hoover Company, all finished product, ready to plug them in and go to work,—A. That is correct.

291 XQ. If that machine has been dropped, should you use the wheel?

Mr. DURKIN. We are still having to call for conclusions

from this witness. I have attempted to be tolerant in these suppositions, and so forth. Now we are going a little too far. They would certainly have to show the resultant condition upon the wheel if, in fact, the machine was ever dropped.

The COURT. I will sustain the objection. There [315] are drops and drops, Mr. Reynolds.

292 XQ. Suppose the wheel has been dropped, should that be used?

Mr. DURKIN. I object to that too, sir, because the thing that is material is the end result of the wheel.

The COURT. I think so. I will sustain the objection.

293 XQ. Now should an emery wheel be forced onto a grinding machine such as in front of the jury? A. Absolutely not.

294 XQ. Should not be forced; absolutely not. Why not? A. It would have a tendency to damage and crack the wheel.

295 XQ. If it is forced on the spindle, it would have a tendency to damage and crack the wheel. Is that right? A. That is correct.

296 XQ. Should the machine be operated at a speed in excess of the recommended r.p.m.'s on the emery wheel? A. Absolutely not.

297 XQ. Now you have testified that on this machine that is in front of the jury here, that says, "Millers Falls Tools," on it, that the recommended r.p.m.— What did you say it was? A. 3450.

298 XQ. Aren't there two sets of numbers there? A. There are; yes, sir.

[316] 299 XQ. What is it, the same number twice? A. No. If you run the unit on 50 cycles, you get one r.p.m. on it. If you run it on 60 cycles, you get another r.p.m. It depends on the current—locale in which you run.

300 XQ. What are the two r.p.m.'s on there? A. 2850 and 3450.

301 XQ. If there were 50 cycles in the power that was being supplied, it would run at 2850? A. That is correct.

302 XQ. If there were 60 cycles in the power that was being supplied, it would run at 3450? A. That is correct.

303 XQ. What assurance does the purchaser of that machine have that that motor won't run faster than 3450 at 60 cycles? A. It is impossible for it to run faster.

304 XQ. Why is it impossible? A. I am not an electrical engineer, but, basically, the electrical properties in the winding that is put into that, that particular unit, it cannot run faster than 3450.

305 XQ. You are assuming, of course, that the winding has been properly done. A. We don't have a winding in our entire plant, and have [317] never had, that runs higher than 3450.

306 XQ. Do they ever have to check grinding machines to see whether they are overspeeding? A. We never have.

307 XQ. You never have? A. No, sir.

308 XQ. Never heard of it being done? A. I would say it is done, but there is no problem on our units, on a bench grinder such as that.

309 XQ. Was it done on any of the grinders manufactured by the Hoover Company when you were there in 1952? Did they ever have to check them for overspeeding? A. No, sir.

310 XQ. Other companies that make grinders, they have to check them for overspeeding, but not your company. A. No. I was just saying it might be done on some grinders but I have never come across a case that we had a problem of a grinder overspeeding.

311 XQ. What do you mean when you say it might happen on some grinders? A. It could happen. Again, as I say, I am not an electrical engineer, but it could happen if certain things were to take place in the electrical end of the motor. It could also happen if your AC current or DC

current was [318] alternated or changed. Your unit would change speed.

312 XQ. What would happen in the motor itself, that you refer to, that would cause it to overspeed beyond the stated limits on the tags? What would be some of the causes in the unit itself? A. To make it overspeed?

313 XQ. Yes. A. The wind you put in there constitutes the r.p.m.; the way you wind it, the number of poles. A 3450 motor, as such, in the industry is called a 2-pole motor. When you begin to change your poles on your winding—getting into electrical properties again— When you begin to change your poles, you change the speed of your motor. And, as such, we have never wound anything but 2-, 4-, and 6-pole motors. Basically, that is it.

314 XQ. I thought you said something in the motor itself could cause it to overspeed. What would that be; the wrong poles, too many poles, or what? A. An incorrect winding.

315 XQ. Do they have some machines whereby they test the speed with which this motor will turn a wheel in your place, in Hoover Company? A. Yes.

316 XQ. And I suppose these motors were all tested before they [319] were sent out. A. Every unit is final-tested; run electrically and also checked mechanically.

317 XQ. That was one of your jobs, wasn't it? A. I was in charge of it but it wasn't my job.

318 XQ. I don't mean personally. You had the responsibility for seeing that these were all checked finally. A. That is correct.

319 XQ. Does the workman have to look at some material or hear something in order to determine whether that motor is running 3450 with 60 cycles or not? A. He takes a tachometer reading.

320 XQ. Is there some human factor involved? A. You read a dial.

321 XQ. Some human being has got to read a dial and make a note, hasn't he? A. That is correct.

322 XQ. Do you keep any records whereby you could go to the number that appears on that machine and tell who was the man that investigated or checked on the motor as distinguished from the other parts? A. No, we don't.

323 XQ. On the sides of the guard here there is somebody's name who tested in there. What did he test, to see if the guard was all right? [320] A. He tested the motor mechanically.

324 XQ. What do you mean by that, whether it would start when you would turn it on or stop when you would shut it off? A. He checked to see all parts were tight; that the correct parts were on it; going to a particular customer, that it had the necessary things that the customer wanted.

325 XQ. When you get an order, Mr. Morton, for a bench grinder, such as this, does the customer—the distributor, in this case, the Millers Falls people—tell you the purpose for which that grinder is going to be used? A. Not specifically, to my knowledge. It is strictly, as I say, a line of bench grinders that we handle and, as such, they buy them; and they are not the only ones that buy them. We build the same one for quite a few different customers.

326 XQ. Sears Roebuck; you probably make one for them? A. Not at all. Stanley Products, to be more specific.

327 XQ. Let me ask you this: Do you know why they build this particular bench grinder with a 7-inch wheel on it, why it isn't a larger one or smaller one? Do you know why that is? A. There are standards that you put on various size units. If you have a 4-inch wheel, that would go on a ¼-horsepower grinder unit. As you progress through a ¾-horsepower, [321] you would take a 6-inch wheel with a certain size bore. As you would get to a ½-horsepower grinder, you would take a 7-inch wheel. A 1-horsepower grinder would take a 10-inch wheel.

328 XQ. What is the reason for the difference in the sizes of the wheels and the motors for grinding purposes? A. The amount of duty that they have to do.

329 XQ. The amount of what, please? A. Duty.

330 XQ. Duty? A. That is right. There are torques involved in each one of these. A torque is basically the strength that that grinder is capable of exerting.

331 XQ. You hear something about torque when you are buying your automobile. A. It is a driving power.

332 XQ. Does the question of the size and strength of the object that is going to be ground enter into the decision as to whether you should use a 4-inch wheel, a 6-inch wheel, a 7-inch wheel, or a 10-inch wheel? A. Yes, I would say it would have to.

333 XQ. On this particular bench grinder—it is meant to grind small hand tools, isn't it? A. It is a bench grinder and, as such, you can use it for [322] varying size tools.

334 XQ. Principally a small tool. A. Yes.

335 XQ. Just to test your general knowledge as a grinding wheel man, what is the largest grinding wheel that you know of that is made? A. You are getting out of my line now as far as grinding wheels.

336 XQ. How far up do you know they go? A. To my knowledge, I have seen wheels up to about 2½ feet.

337 XQ. About 2½ feet in diameter? A. That is correct.

338 XQ. And a wheel of that size would be capable of doing pretty heavy work—about 2½ feet. A. Absolutely.

339 XQ. And that points up what you said a minute ago, doesn't it, that the size of the wheel has something to do with the duty that is expected or the torque that is going to be applied? A. That is correct.

340 XQ. To what extent was this wheel— To what extent was a 7-inch wheel on a bench grinder applied at the Hoover Company in 1952?

Mr. DURKIN. May I have that?

(Question No. 340 read by reporter)

[323] Mr. REYNOLDS. I withdraw that.

341 XQ. In 1952 when a 7-inch wheel was being put on a bench grinder at the Hoover Company, to what extent would the nut that holds the flange that holds the grinding wheel on the grinder be tightened? Do you understand the question? A. You mean the pressure that would be exerted to put that on?

342 XQ. How much pressure would you put on the nut that is up against that flange, which, in turn, is up against a wheel, 7-inch wheel? A. It doesn't need extreme pressure at all.

343 XQ. Mr. Witness, not only does it not need extreme pressure; but if extreme pressure were exerted on that nut, it would have a tendency to crack the wheel, wouldn't it? A. That is correct.

344 XQ. When the wheel, a 7-inch wheel, is being placed on a grinder, a bench grinder, the reason why excessive pressure is not used to tighten the nut at the flange is because if you put too much pressure on it and if you tighten the nut too tightly against that flange, the tendency is going to be to break the wheel. Is that right? A. Possibly, yes.

345 XQ. That is because the heat builds up too fast in there when that begins to revolve at 3600 revolutions a minute, [324] isn't it, among other things? A. Among other things.

346 XQ. Do you know one or two other things you could throw in for good measure? A. You put undue stresses on the wheel without even revolving as far as that goes.

347 XQ. You could crack it if it didn't turn at all: A. That is right.

348 XQ. These blotters similar to and such as this one that is identified as Defendant's Exhibit A for identifica-

tion,—these blotters that are placed on 7-inch grinding wheels are placed there not only to identify the manufacturer of the grinding wheel; they also serve a useful purpose when you place the flange against them, don't they? A. That is correct.

349 XQ. They aren't just put on there for the advertiser to make sure the people know whose grinding wheel they are buying. Is that right? A. That is right.

350 XQ. Do you call this a blotter in the trade? What do you call a thing of this kind? A. Yes, I always call it a blotter.

351 XQ. What purpose does a blotter serve when it is attached to a grinding wheel and then a flange placed against it, and [325] the flange, in turn, is tightened by use of a nut on the end of a spindle? A. It would act as a cushion.

352 XQ. It acts as a cushion: Have you ever seen a blotter on a machine where there was more than one thickness? A. You mean the blotters of different thicknesses?

353 XQ. There were two blotters or three blotters, one on top of the other. A. I haven't seen any, no.

354 XQ. Mr. Morton, if there were no blotter on a 7-inch grinding wheel and the grinding wheel was placed on the grinding machine, such as the one that is in front of the jury, and then the flange put on and the nut tightened, without a blotter there, there would be grave danger of there being a break in the wheel, wouldn't there? A. I would say so, yes.

355 XQ. Would you say if a person had a grinding wheel where the blotter had been destroyed, but, nevertheless, placed it on a grinding machine, put the flanges on, and tightened the nut,—would you say that that person ran a grave danger of having that wheel break right then and there even without it turning around once?

Mr. DURKIN. Objected to as being totally speculative

on behalf of this witness. It calls for a conclu [326] sion based upon too many facts.

The COURT. I think he has told us what the purpose of the blotter is. I will sustain the objection.

356 XQ. Now a piece of work that is being worked on by a workman, should it be jammed in the space that will be between the wheel and the rest? Should it be jammed in there? A. No.

357 XQ. What would happen if it were jammed in there? A. That is hard to say. One thing that could happen, you would stall the unit.

358 XQ. You could what, please? A. You would stall the unit.

359 XQ. Would anything happen to the emery wheel in your judgment?

Mr. DURKIN. I have to object. I tried not to object but this is beyond—

The COURT. I think it is somewhat speculative. I will sustain the objection.

360 XQ. How would a person attempting to grind an article on a bench grinder determine what material is satisfactory to grind on it or what material is unsatisfactory to grind on it, do you know? A. How would you determine?

361 XQ. Yes. A. If you were using normal material, such as any one of us [327] might use, normal steels, and so forth, around the house or in a normal shop, you wouldn't have any problem with the grinder. If you were using special alloys, you would have to check on a handbook.

362 XQ. Where would a person get a handbook? A. You can get them from various sources.

363 XQ. You don't put any in the boxes that you send out with the machines? A. No, we don't. As I said before, we build this for a customer. If he wants to put that in, he can.

364 XQ. That would mean if the Millers Falls people wanted to put in a book of instructions as to how to use these machines,— A. They would send them to us and we would have to put them in.

365 XQ. —they would send them along. There is no reason that you know of why they couldn't put them in at their own plant when you sent them up, is there? A. They couldn't get in the carton. They would have to rip every one open.

366 XQ. Mr. Morton, I think you said this morning that when you received the grinding wheels from the American Emery Wheel, you received them in barrels. A. That is correct.

[328] 367 XQ. And there was sawdust and other things in there. Right? A. Sawdust.

368 XQ. Your workmen at the Hoover Company in 1952 had the job of opening the barrel, No. 1, didn't they? A. Yes.

369 XQ. Did they use a hammer and chisel to open the barrel? A. Probably a hammer.

370 XQ. How many pounds? A. Medium size hammer.

371 XQ. They used a hammer to open up the barrels. Did they break the side of the barrel in? A. No.

372 XQ. How do they open it? A. The top is removed.

373 XQ. Is the top nailed when it arrives there? A. As all barrels are, yes.

374 XQ. And they have to break the wood, do they? A. That is correct.

375 XQ. The barrel of grinding wheels is up on its end, isn't it? A. That is right.

376 XQ. Not on the round surface; it is up on its end. And the man takes the top of the barrel—he has a hammer —and whacks that wood until he breaks it. A. That is right.

[329] 377 XQ. And when he breaks the wood, the top, he takes out the wheels. A. After digging.

378 XQ. After digging. That is assuming there weren't any wheels near the top. A. I have never seen any at the top.

379 XQ. You have never seen one but it could be there, couldn't it, even though you have never seen one in the handling? A. It could be.

380 XQ. And then the workman takes them out separately by hand, I presume, out of the barrel. A. That is correct.

381 XQ. He puts them in a wheelbarrow, I suppose, to cart them to some bin. A. He puts them directly into the bins.

382 XQ. And the bin is what, 3 or 4 feet off the floor, high, or a foot high? A. They run from 2 inches off the floor and in sections on up to 7 feet high.

383 XQ. And he has to pack them in there? A. That is correct.

384 XQ. Does the fellow ever drop them once in a while? A. He might.

385 XQ. Then they are packed there. Then after you get ready to assemble this machine, I presume the application of this [330] emery wheel is probably one of the last things you do before you put that side guard on, isn't it? A. That is correct.

386 XQ. Then a workman goes to the place where they store these wheels and he lifts them out by hand. A. No, they are issued to him.

387 XQ. Somebody else takes them from where they have been stored and hands them to the workman. A. No, they have them taken down there by cart.

388 XQ. That means some other workman has to go in this storage place, handle the wheel, put it on some sort of a cart; 4-wheel or 2-wheel cart. A. That is correct.

389 XQ. Pack them up, one on top of the other. A. That is correct; in a box.

390 XQ. But they are right on top of one another. A. That is correct.

391 XQ. Sawdust in between them? A. No.

392 XQ. There is nothing in between them. A. That is correct.

393 XQ. Then he wheels them down to the place where the workman is going to put them on this machine. Is that right? A. Right.

[331] 394 XQ. There is quite a little handling of those emery wheels in your own premises, isn't there? A. Two or three times, yes.

395 XQ. When they get to the workman who is putting them on the bench grinder, does he pick them up and just put them on the wheel? A. He looks them over visually and puts them on.

396 XQ. He doesn't tap it with a hammer to get a ring, does he,— A. No.

397 XQ. —to make sure there isn't some crack that has gotten in that wheel while it was being put in your place or cart there, does he? A. No, he visually looks at it.

398 XQ. He doesn't hit it with a little hammer to see if it rings or anything. If he doesn't see any crack he can see with his own eyes or with the aid of reading glasses, that wheel goes on the machine, doesn't it? A. That is correct.

399 XQ. After that wheel gets on the machine, what do you people do with it as far as testing a 7-inch emery wheel: just turn on the motor and let it run around? A. Turn the motor on and take meter readings while it is running.

400 XQ. What does the meter reading show? [332] A. Shows whether electrically the motor is satisfactory.

401 XQ. The meter reading doesn't show anything with regard to the emery wheel? A. No.

402 XQ. So the only inspection that you people make of these emery wheels after you receive them from the supplier, whether it is American or Universal,—at that time in '52—was that when the man is about to put the wheel on the machine, he visually looks at it with his own naked eye or assisted by reading glasses; and if he doesn't see any cracks in it, he just puts it on the machine. A. They are checked at receiving inspection. I said previously they were checked when they come in. When they are removed from the barrel, they are inspected.

403 XQ. And they are inspected before they are stacked away in your storeroom. A. That is correct.

404 XQ. And not inspected again until just before they are being put on the machine. A. That is correct.

405 XQ. And they are handled in the meantime by at least two other workmen. A. That is correct.

[333] 406 XQ. Now the back of this machine— Can you step down, please, Mr. Morton for a half of a minute? (Witness descends from witness chair) The back of this machine, it looks like an exhaust on the back of an automobile. All right; you may take your seat again now, please. Thank you. (Witness resumes witness chair) That is the way that is made by your company. A. That is correct.

407 XQ. What is the purpose of having that—I will call it an exhaust for purposes of identifying it a little more easily— What is the purpose of having that exhaust on the machine? A. That is to take away any material that is removed from the wheel or from the piece you are grinding.

408 XQ. If there is a chip that comes off the grinding wheel as it goes around, it is intended to go out through that and go to the back. Is that right? A. That is right.

409 XQ. That is a safety feature, is it? A. That is correct.

410 XQ. Is that primarily why that exhaust, as I call it, is on there, to carry away from the operator any little

pieces that might come off the machine or the tool—I am [334] sorry—any pieces that might come off the wheel or the tool while it is being used? A, Yes, sir.

Mr. REYNOLDS. Will your Honor excuse me a minute? I have no further questions, your Honor.

Redirect examination by Mr. Durkin.

411 Q. Just maybe two or three. We heard about the pressure that,—or what would be the result of the pressure, if there be excessive pressure, if this nut or bolt, or whatever it is, is tightened excessively. Is that not correct? A. That is right.

412 Q. And actually the word, excessive, is a relative term depending upon a particular use. Is that not correct? A. That is correct.

413 Q. Will you tell the Court and jury, Mr. Morton, please, what type of instrument is used to put that type of bolt on at your plant? A. An air gun.

The COURT. What?

The WITNESS. Air gun.

414 Q. Also, when you were asked about holding tools and small tools to be used on here, actually, Mr. Morton, isn't it a fact that the particular substance involved rather [335] than the size of that substance is the determining factor whether or not it is an applicable attachment to that wheel? A. What anyone wants to grind on there is, as far as we are concerned, their business. We feel anyone that buys a unit that size will know the use to which they want to put the article and they will not try to grind something as big as a house on a small bench grinder.

415 Q. But the physical size— For instance, if I had a 4 by 4 piece of thin tin and put it against that wheel, of course, there would be nothing wroing with that, would there? A. No.

416 Q. If I had a piece of metal the size of my glasses,

8 inches in diameter, in thickness, very heavy in character, and I put that against the wheel, of course, there would be a different effect upon that wheel. Is that not right, sir? A. That is correct.

417 Q. So actually the substance or matter that is being applied to the wheel is the important thing rather than the size. A. Again it refers back to the torque, the pressure you exert.

418 Q. Yes, sir; the torque pressure against that wheel is the [336] important thing. A. That is correct.

419 Q. And it makes no difference at all whether or not I hold an object this way or this way? (indicating) A. It makes some difference as to how you grind on it, depending on whether you jam down between the units we have on it for safety.

420 Q. Yes, sir; but aside from the particular question of jamming, it doesn't make a bit of difference whether or not the angle be up or the angle be this way, does it, sir? (indicating) . A. Angles are not relative at this point.

421 Q. You do not supply any type of Allen wrenches in the container that these machines go out in, do you, sir? A. None.

Mr. DURKIN. I think that is all I have. Thank you, Mr. Morton.

Recross-examination by Mr. Reynolds.

422 XQ. The angle that is used in holding a piece of metal of any kind is important on the question of whether or not the thing gets jammed between the rest and the wheel. That is the important consideration when you are considering the angle of the material. Isn't that right? A. Eliminating all the other things, yes, that is right. I [337] mean how you want—I know how I would grind if I were going to use it. If you jam anything down at the point you just pointed at—

423 XQ. The point I pointed at was between the wheel and the rest. A. If anything gets out of your hand and gets in there, yes, you have got trouble.

424 XQ. Secondly, I want to ask you about the air gun. Is that something that is automatic, that tightens up a nut? A. Yes, it is at a set torque. It has a certain strength that tightens those nuts up automatically.

425 XQ. Does an operator have to put something on this? What do you do; put the nut on the spindle, you tighten it up as far as you can by hand; or is the whole thing done by this air gun? A. You put the nut on just so you start it, and the air gun puts it all the way.

426 XQ. Does a man have to take a—put it up against the— Does he have to hold the trigger to shut it off? A. It automatically slips when it gets to a certain pressure.

427 XQ. That is assuming the gun is in proper shape. What happens if a man holds a finger on the trigger longer than he should? A. It keeps slipping. Can't tighten over a certain poundage.

428 XQ. When this gets out into the field and a man is putting [338] this nut on by the aid of a monkey wrench or a similar tool, then, of course, he has got to use some pretty good judgment about putting this on. A. That is up to him.

429 XQ. This shaft on this bench grinder that is in front of this jury is the same shaft that is on either side of the motor. Is that correct? A. That is correct.

430 XQ. And when one wheel on one side moves, the wheel on the other side moves exactly the same number of revolutions. Is that right? A. Yes, sir.

431 XQ. If there were an emery wheel on the left side of this machine that I am looking at here, if a man was tightening up this nut, could he hold onto the left wheel so that he could exert some pressure in tightening up the nut? A. Yes.

432 XQ. That would be the way to do it, wouldn't it? A. Yes.

433 XQ. Then it depends on how tightly he holds this wheel over here as to how much pressure he wants to exert there. A. That is right.

434 XQ. When I say there, I mean at the site of the nut which [339] holds the flange of the wheel on the opposite side of the machine. Right? A. That is correct.

Mr. REYNOLDS. I think that is all, Mr. Morton.

Mr. DURKIN. That is all I have, sir.

(Conference at the bench between the Court and counsel.)

---

* * * * * * * * *

CHARLES W. PARSONS, Sworn.

* * * * * * * * *

Cross-examination by Mr. Reynolds.

[343] 32 XQ. Mr. Parsons, were you subpoenaed to come here today? A. I was; only they called me Parson instead of Parsons. They forgot to put the "s" on here. I am not a parson.

33 XQ. Mr. Parsons, when you say that you had on hand a small number of wheels at one time from the Norton Company, made by the Norton Company, the wheels you refer to were [344] similar in type to the one that is exhibited before the jury, that I am pointing to. A. I would say so.

34 XQ. Namely, a 7-inch wheel. A. Yes, we have had some.

35 XQ. With about what, an inch-and-something across the face of it? A. About that.

36 XQ. And 5/8ths— A. 5/8ths hole.

37 XQ. —put on the thing. What would be the point in carrying a few extra Norton wheels of the same type as the

one that is on that machine that is in front of the jury? A. I am not in the sales department but I would assume if a man wore a wheel out, he would want another one, and the easiest place to get it was from us.

38 XQ. Would you also assume if a man had a machine that bore your name plate, such as this one does here, Millers Falls Tools, if he broke a wheel, he would know where to get one too, wouldn't he? A. Mostly he would go to a hardware store. The sale of the individual wheel didn't amount to much. In fact, we gave it up several years ago, just gave it up entirely.

39 XQ. In 1952 and 1953 you hadn't given it up. [345] A. I think we had a few wheels in stock.

40 XQ. You had a few wheels in stock in 1952 and 1953. A. Whether that size or not, I couldn't say. I wouldn't know what size.

41 XQ. There probably were some of that size, were there not? A. I wouldn't dare say; I wouldn't know.

42 XQ. You wouldn't deny it or you wouldn't admit it. A. I wouldn't commit myself either way because I wouldn't know.

43 XQ. Did your company buy a bench grinder from any other company other than the Hoover Company or Kingston Conley Company in 1952 and 1953? A. No, sir; we did not, no.

44 XQ. Do you buy them from any other company now?

Mr. DURKIN. Objected to as being immaterial.

The COURT. It is immaterial what he does now. We are interested in 1952.

45 XQ. Well, now, the grinders that you made in your plant in 1952, did you say, were larger than this bench grinder? A. Nothing like that at all.

46 XQ. Whose wheels did you use on those? A. The only wheel I can recollect was a Manhattan Rubber Company in New York.

47 XQ. That was for the portable one you spoke of. [346] A. The portable one, yes. We never made this type.

48 XQ. Did you make any heavier than that? A. Never made anything of this type at all.

49 XQ. I am not asking you of this type; I say heavier than that. In other words, let me put it to you this way: You made a portable grinder which is smaller than that, you said. Right? A. I didn't say it was smaller. I said it was a different type of grinder.

50 XQ. It may not be smaller but it is a different type. A. Different type of grinder.

51 XQ. Would the portable type that you referred to sometimes use 7-inch wheels like this one? A. No, I don't think so.

52 XQ. You are not sure of it though? A. I am pretty sure not.

53 XQ. What would be the maximum size of the wheels on the grinders you people make? A. I think they are 6 inches. The kind we make are the type used in a garage if you had a wrecked car, work like that, but not this type of a grinder.

54 XQ. There isn't much difference between a 6- and 7-inch wheel, is there? Just to look at it, wouldn't it be kind of hard to tell whether it was 6 or 7 inches? [347] A. I don't think so.

55 XQ. Did you make anything that took wheels larger than 7 inches, grinding wheels? A. No, we didn't.

56 XQ. You didn't? A. No.

57 XQ. These grinders, when they came in, were stored in whatever container they came in? A. That is right.

58 XQ. They were stored on your premises? A. That is right.

59 XQ. Did they come in by motor carrier, freight? A. Usually.

60 XQ. Would it be some of your men; that is, employees of Millers Falls, who would unload the— A. That is right.

61 XQ. —motor carrier? A. Yes, sir.

62 XQ. How much would you say one of these bench grinders weighs approximately? A. Oh, I haven't any idea. I would say about 30 pounds roughly; 25, 30 pounds.

63 XQ. Would these be taken by some of your employees and put on a hand truck of some kind and wheeled to some part [348] of your factory or warehouse, there to be stored awaiting a purchaser? A. They would take them off the truck they come in, and put them on a hand truck, and take them somewhere where they would be stored, yes.

64 XQ. Would there be one or two men handling each one of these? A. That I wouldn't know.

65 XQ. Then they would be stored in a warehouse on some part of your premises? A. That is right.

66 XQ. Indoors and under cover? A. Under cover; that is right.

67 XQ. When an order comes in to sell one of these, some workman goes down and puts a stenciled name on the carton giving the name of the consignee or the purchaser? A. Correct.

68 XQ. And would he have to move that carton or case around in order to put the stencil mark on it? A. He would move it onto a work bench. He might.

69 XQ. Would these bench grinders be piled one on top of another in their respective cartons or cases while they were awaiting an order? A. They would, about five or six high.

70 XQ. Any one of these ever fall off, to your knowledge, once [349] in a while? A. Not to my knowledge.

71 XQ. Not to your knowledge? A. No.

72 XQ. Then the workman, after he took it from this pile of five or six cases, possibly he would bring it to a bench? A. That is right.

73 XQ. Then after that would he put it on a hand truck and bring it out to a motor carrier, freight? A. As a rule.

74 XQ. As a rule. During all of those operations that carton that you had there from the Hoover Company with this grinding machine in it was never opened. A. That is right.

75 XQ. By any of your employees at any time. A. That is right.

76 XQ. To see whether there had been any damage in transit from the Hoover Company to your place at Millers Falls. A. Correct; never was opened.

77 XQ. Never was opened. A. No.

78 XQ. And then it still remains unopened on your premises and when you get ready to ship it to a customer, it is stenciled and wheeled out to some other mode of con [350] veyance like a motor carrier or freight car, and it is loaded. A. That is right.

79 XQ. And you don't open it at that time. A. Never open it at all.

80 XQ. So you would never know what particular grinding wheels were on any particular bench grinder that you sold, would you? A. No, I wouldn't.

81 XQ. You wouldn't know who manufactured them? A. Not a bit.

Mr. REYNOLDS. I think that is all, your Honor.

Mr. DURKIN. Thank you, Mr. Parsons.

The WITNESS. You are welcome, sir. Am I excused now?

Mr. DURKIN. I have no further— Mr. Reynolds, do you want Mr. Parsons any longer?

The WITNESS. Am I excused, your Honor?

The COURT. You certainly are, sir. The Court will take a short recess at this point.

* * * * * * * * * *

Office - Supreme Court, U.S.
FILED
MAY 31 1957
JOHN T. FEY, Clerk

No. ~~1048~~ 155

Supreme Court of the United States.

OCTOBER TERM, 1957.

THE AMERICAN EMERY WHEEL WORKS,
Petitioner,

v.

WHIT MASON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

FRANCIS V. REYNOLDS,
Attorney for Petitioner,
724 Industrial Bank Building,
Providence, Rhode Island.

Of Counsel:
RICHARD P. MCMAHON,
724 Industrial Bank Building,
Providence, Rhode Island.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

Table of Contents.

Opinions below	1
Jurisdiction	2
Question presented	2
Statement of the case	2
Reasons for granting the writ	4
Conclusion	15
Appendix A	16
Appendix B	18

Table of Authorities Cited.

CASES.

Adam Hat Stores, Inc., v. Lefco, 134 F. (2d) 101	6
American Creosote Works v. Harp, 215 Miss. 5, 60 So. (2d) 514	12
Bernhardt v. Polygraphic Co., 350 U.S. 198	6, 7, 14, 15
E. I. DuPont de Nemours & Co. v. Ladner, 221 Miss. 378, 73 So. (2d) 249	5, 12
Ensminger v. Ensminger, 222 Miss. 799, 77 So. (2d) 308	10, 11
Erie R. Co. v. Tompkins, 304 U.S. 64	2, 5, 6, 7, 12, 13, 14, 15
Fish & Oyster Co. v. First Nat. Bank, 166 Miss. 162, 146 So. 116	11
Ford Motor Co. v. Myers, 151 Miss. 73, 117 So. 362	5, 9
Gordy v. Pan American Petroleum Corporation, 188 Miss. 313, 193 So. 29	5, 11
Kansas City Life Ins. Co. v. Wells, 133 F. (2d) 224	7
MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050	9
Mason v. American Emery Wheel Works, 241 F. (2d) 906	9
Paul Revere Life Ins. Co. v. Stanfield, 151 F. (2d) 776	6

Rainey v. Horn, 221 Miss. 269, 72 So. (2d) 434 11
State v. Tingle, 103 Miss. 672, 60 So. 728 11
United States v. Jones, 229 F. (2d) 84 6
West v. A. T. & T. Co., 311 U.S. 223 7, 8, 10, 14, 15
Wichita Co. v. City Bank, 306 U.S. 103 7

STATUTES, ETC.

28 U.S.C. secs. 1254 (1) and 2101 (c) 2
28 U.S.C. sec. 1332 (a) (1) 2

Federal Rules of Civil Procedure, Rule 41 (b) 3

Supreme Court of the United States.

OCTOBER TERM, 1957.

THE AMERICAN EMERY WHEEL WORKS,
Petitioner,

v.

WHIT MASON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit (R.A. p. 233), entered in the above case on March 8, 1957, reversing an order of dismissal of the District Court of the United States for the District of Rhode Island (R.A. pp. 127-129).

Opinions Below.

The opinion of the District Court for the District of Rhode Island (R.A. pp. 127-129) does not appear in the Official Reporter and the opinion of the Court of Appeals (R.A. pp. 225-232) is reported in 241 F. (2d) 906. Both of these opinions are hereto appended and marked "Appendix A" and "Appendix B," respectively.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit sought to be reviewed was made and entered on March 8, 1957 (R.A. p. 233).

The jurisdiction of this court is invoked under 28 U.S.C. secs. 1254 (1) and 2101 (c), which permit a review by this court of cases in the Courts of Appeals by a writ of certiorari granted upon the petition of any party to any civil case after rendition of judgment, which petition shall be taken or applied for within ninety days after the entry of such judgment.

No motion for rehearing was sought in the Court of Appeals.

Question Presented.

Whether, in an action for negligence, based upon diversity of citizenship, the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), was violated by the decision that a local precedent will be overruled (*a*) without any consideration of the local *stare decisis* rule, or the local jurisprudence, which compel a different result from that which the court below expressly predicated on general or federal law, and (*b*) without any finding of departure, inconsistency or criticism in the local law.

Statement of the Case.

This is a civil action for negligence, commenced in the United States District Court for the District of Rhode Island, brought by a citizen of Mississippi against a Rhode Island corporation, based upon diversity of citizenship. 28 U.S.C. sec. 1332 (a) (1). The complaint alleged, and

the evidence at the trial showed, that the plaintiff was injured by the disintegration of an emery wheel on February 10, 1953, while operating a bench grinder with an emery wheel attachment, in the scope of his employment by T. H. Pearce Company in Mississippi (R.A. 9, 10, 25).

The emery wheel which disintegrated was on the bench grinder when the plaintiff's employer purchased it from a Mississippi corporate distributor, Komp Equipment Company (R.A. 11-13). The bench grinder had actually been manufactured by the Hoover Company, a corporation in New Jersey, under the label of Miller Falls Company, a corporation in Massachusetts, which received the bench grinder from New Jersey and shipped it to the Mississippi corporation for sale in that state (R.A. 98, 99, 102, 103, 222, 223). The defendant Rhode Island corporation was one of two suppliers of emery wheels to the New Jersey corporation, which actually assembled the bench grinder (R.A. 83).

At the conclusion of the plaintiff's case the defendant made an oral motion to dismiss the complaint under Rule 41 (b) of the Federal Rules of Civil Procedure. In support of its position the defendant relied upon a decision of the Supreme Court of Mississippi which has not been overruled or modified or contradicted or criticized by any subsequent development in the law of Mississippi. The plaintiff argued that dicta in a later Mississippi case, which referred to the law in other states, should control as a binding exposition of current Mississippi law. The United States District Court for the District of Rhode Island granted the defendant's motion, in reliance on the unimpeached pronouncement of the highest court of Mississippi, and an order was entered dismissing the complaint (R.A. 127-129).

On appeal by the plaintiff to the United States Court of Appeals for the First Circuit, an opinion was rendered by

the court on March 8, 1957, vacating the order of the District Court in dismissing the complaint and remanding the case to the District Court of Rhode Island for further proceedings (R.A. 225-232).

Reasons for Granting the Writ.

In deciding that a local precedent will be overruled the court below erroneously measured the prospect of change by general rather than local law and made a conjectural inference, without warrant in any local expression. The erroneous method employed for the ascertainment of local law, and the kind of inference drawn, constitute errors, plainly shown by the opinion of the court below, which ought to be reviewed by this court.

It is undisputed, and clearly stated in the opinion of the court below, that the highest court in the controlling jurisdiction of Mississippi has made a pronouncement directly disposing of the question involved, provided that the pronouncement is still a part of the local law. Since it was the United States District Court for the District of Rhode Island which enforced the Mississippi precedent and the United States Court of Appeals for the First Circuit which denied enforcement of the Mississippi precedent, this determination of state law does not have the added weight which attaches to a local law exposition by local federal judges specially versed in that law.

Furthermore, the court below, lacking the presumed advantage of a special competence in the local law being declared, nevertheless expressly based its refusal to enforce the Mississippi precedent on the disposition of other jurisdictions to overrule precedents of theirs corresponding to the Mississippi precedent. This resort to general or federal law was not even prefaced by the slightest sug-

gestion of any examination or consideration of Mississippi's disposition to overrule its precedents, assuming that they were no longer favorably regarded there. And the decision of the court below does in substance assume that the highest court of Mississippi is dissatisfied with this precedent, because no local expression of dissatisfaction, even one implicit in a local inconsistency, or departure, is quoted, cited or referred to in the opinion of the court below.

The local precedent here involved was decided in 1928 and cited with approval in 1940. *Ford Motor Co.* v. *Myers*, 151 Miss. 73, 117 So. 362 (1928). *Gordy* v. *Pan American Petroleum Corporation*, 188 Miss. 313, 331, 193 So. 29, 34 (1940). The inference that it will be overruled is derived solely from a 1954 *dictum*, which simply made a brief reference to the law of other states and expressed no criticism, doubt or misgiving about the controlling local Mississippi law. *E. I. DuPont de Nemours & Co.* v. *Ladner*, 221 Miss. 378, 73 So. (2d) 249 (1954). In addition to the required recognition of the local jurisprudence, it is submitted that the nature of the *Erie* doctrine makes certain conditions essential for any permissible inference involving rejection of a local precedent. The ultimate inference of a local law char must be supported by certain preliminary findings expressly made. Since there should be a presumption favoring the validity of a local precedent, there must be evidence of inconsistency, departure or criticism in the local law and the indication of a change must be clear. The ultimate finding must be supported by substantial evidence in the local law. These requirements are logical corollaries of this court's insistence upon a cautious confinement to the origin of state created rights in the enforcement of them. None of these requirements are fulfilled in this case.

It is submitted that these errors ought to be reviewed by this court for any one of the following three reasons: (*a*) the important unsettled question of federal law which is involved should be decided; (*b*) the conflict between the opinion of the court below and decisions of this court should not be permitted; (*c*) an important question of local law has been decided in a way which conflicts with the applicable and ignored state law.

The standards, and the general essential conditions for the inference of a change in local law, present an important question in the administration of the federal doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), which has not been, but should be, settled by this court. See *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 204, 205 (1956). The federal courts are burdened with an inordinate and disruptive uncertainty by the obligation to infer changes in local law without any authoritative guide for the manner of making the inference. Especially in connection with inferences of local law changes it is necessary for this court to direct that local law inferences be disciplined by conformity with the local jurisprudence. Without such direction, and by the example of this case, the *Erie* doctrine is practically reversed and completely subverted by an incomplete application. The pre-*Erie* evils of forum shopping are revived by the opportunity to achieve a different result through the application of state law according to a federal jurisprudence. The accommodation of that doctrine to the changing laws of the several states is a matter of the greatest magnitude. The federal courts have great need for this court to provide definite interpretative guides for the ascertainment of the organic law of the several states. See *Paul Revere Life Ins. Co.* v. *Stanfield*, 151 F. (2d) 776 (10 Cir. 1945). Also compare the method employed in *Adam Hat Stores, Inc.*, v. *Lefco*, 134 F. (2d) 101, 103 (3 Cir. 1943), and *United States* v. *Jones*, 229 F. (2d)

84, 86 (10 Cir. 1955), with that in *Kansas City Life Ins. Co.* v. *Wells*, 133 F. (2d) 224, 228 (8 Cir. 1943).

Furthermore, it is submitted that the decision of the court below has implicitly interpreted that doctrine in a way which conflicts with the *Erie* case and with the intimations of related decisions of this court. The entire local law was not applied. See *Bernhardt* v. *Polygraphic Co.*, *supra*, at 209-212; *West* v. *A. T. & T. Co.*, 311 U.S. 223, 237, 238 (1940); *Wichita Co.* v. *City Bank*, 306 U.S. 103, 107 (1939). Given the obligation to search for pronouncements from even intermediate state courts, *West* v. *A. T. & T. Co.*, *supra*, it seems anomalous for this lower court not to consider Mississippi jurisprudence, an integral part of the local law. As a result, the court below has decided an important local rule in a way in conflict with applicable state law.

It is therefore these errors which are presented for review by this court: (1) the method chosen by the court below, its express reliance on general law to the exclusion of the contrary local law, in assessing the likelihood that the local precedent will be overruled; and (2) the additional disregard of state law and the federal standards necessary for its ascertainment, implicit in the unfounded determination of local dissatisfaction with a local rule based only on a discovered local awareness of the currency of the contrary rule elsewhere.

The administration of the doctrine of *Erie R. Co.* v. *Tompkins*, *supra*, requires adherence to standards for state law determination which are appropriate to the effectuation of the constitutional and congressional distribution of judicial power in our federal system. This court has refused to subordinate doctrinal considerations in order to ease the burden of ascertaining state law, by directing the federal courts ". . . to ascertain from all the available data what the state law is and apply it rather

than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law.'" *West* v. *A. T. & T. Co.*, 311 U.S. 223, 237 (1940). It is submitted that there is great need for an equally clear direction to include among the available data of a particular state the criteria developed in that state for the assessment of precedents, as well as the precedents themselves.

The court below has inferred that an expressly adopted and recently affirmed judicial rule of Mississippi no longer pertains in that jurisdiction because the Mississippi court more recently indicated "its awareness of the modern trend," which is contrary to the adopted judicial rule of Mississippi. It is submitted that this conjectural result was reached by the use of an erroneous method for the determination of state law: The lower court did not consider the jurisprudence of Mississippi and whether or not it contains a judicial tradition of adherence to precedents, leaving changes to the legislature, but, instead, the court guided its interpretation by the assertion that—

> "*MacPherson* v. *Buick Motor Co.*, supra, started a new trend in this particular field of the law, and its substantive result has found favor in § 395 of the American Law Institute Restatement of Torts. If the Supreme Court of Mississippi had recently reconsidered the rule it applied in *Ford Motor Co. v. Myers*, supra, and had decided to adhere to it on the ground of stare decisis, no doubt the federal courts would have had to accept the local law as so declared. But it would be gratuitous and unwarranted to assume that the Supreme Court of Mississippi would now so hold, when we bear in mind the readiness of other courts, in conservative jurisdictions at that, to overrule their earlier holdings and to bring their jurisprudence into accord with what is now the overwhelming weight of authority."

This approach to the federal court obligation to ascertain state law is completely unrelated to the available data on local law. Whether the federal court was warranted to assume that local law has changed depends first on the local jurisprudential criteria for making a change by judicial decision and secondly upon the local expressions indicating a change. It is not enough to ascertain that a local rule has not been recently reconsidered in the light of *stare decisis*. The important examination is to ascertain what the local *stare decisis* is, for the local *stare decisis* governs, not the general or federal notions on the subject.

The significance of the local *stare decisis* in this case is emphasized by the fact that the critical local precedent rejected by the court below was based upon the local *stare decisis*:

> "Appellee relies on decisions of courts of other jurisdictions, which hold that the manufacture of appliances which will become highly dangerous when put to the uses for which they are intended, because of defects in their manufacture, owes the public a duty, irrespective of any contractual relation to use reasonable care in the manufacture of such appliances. As stated, our court has held to the contrary, as shown in the decisions above cited."
>
> *Ford Motor Co.* v. *Myers*, 151 Miss. 73, 78, 117 So. 362, 363 (1928).

As pointed out in the concurring opinion of the lower court's decision, the case of *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), which "started a new trend in this particular field of the law," was approximately twelve years old when it was "considered and rejected by the Mississippi Supreme Court sitting in the *Ford* case." *Mason* v. *American Emery Wheel Works*, 241

F. (2d) 906, 910 (1 Cir. 1957). The stated reason for Mississippi's refusal to adopt the "new trend" was a *stare decisis* determination.

The local policies of stability and orderly processes of change in local law, contained in the local judicial doctrine of *stare decisis*, ought to be examined and given great weight by the federal courts before making any inference of a change in local law. The local jurisprudence must be consulted in order to ascertain whether an intimation of a local court is a "clear and persuasive indication that its pronouncement will be modified, limited or restricted." *West* v. *A. T. & T. Co.*, 311 U.S. 223, 236 (1940). It is the local law which must supply a readiness to overrule precedents without insisting on a change by legislation. It is the local law which must determine what factors, if any, may contribute to the erosion of a rule, and the relevance and significance of such factors as the age of a rule, the consistency and steadiness of its application, its merit as an original proposition, and its operation under changed circumstances. The likelihood of reconsideration of a rule must be judged by locally recognized reasons for such a reconsideration and by the local process for any such reconsideration, whether undertaken abruptly or by a gradual deliberate criticism. Finally, it is the local law which must give value to dictum, prescribing whether and when it may be considered as the opinion of the court rather than the expression of an individual.

Less than three decades is a short life span for a substantive rule of law. Measured by the jurisprudence of Mississippi, as it must be measured, it is an intolerably short span of life. Apart from any local imperative on the necessity for legislative intervention in order to cut so short the life of a rule, there is to be considered and enforced the local law's command that change of substantive rules be sought in the legislature. See *Ensminger* v.

Ensminger, 222 Miss. 799, 77 So. (2d) 308 (1955). The abruptness of a change, the absence of departure from established principle, must be weighed on local scales. In Mjssissippi the absence of departure carries great weight in the operation of a local rule which strongly insists upon adherence to precedent. See *Ensminger* v. *Ensminger*, *supra*; *Rainey* v. *Horn*, 221 Miss. 269, 280, 72 So. (2d) 434, 438 (1954). Conversely, a dictum is locally insignificant because the jurisprudence of Mississippi classifies it as more the expression of an individual writer than the opinion of the court. See *Fish & Oyster Co.* v. *First Nat. Bank*, 166 Miss. 162, 173, 146 So. 116, 119 (1932); *State* v. *Tingle*, 103 Miss. 672, 678, 60 So. 728, 729 (1912).

There is no indication that the Mississippi court has been unmindful of its rule these past three decades.

> "Under the views which we have hereinbefore expressed we deem it unnecessary to discuss the cases of . . . and *Ford Motor Co.* v. *Myers*, 151 Miss. 73, 117 So. 362, relied upon by the appellee, petroleum corporation, wherein no duty was owed by the defendant to the plaintiff under the facts thereof, and which do not deal with highly inflammable and dangerous substances placed on the market by the seller as its own product and under a name which would indicate that it was not inherently dangerous."
>
> *Gordy* v. *Pan American Petroleum Corporation*, 188 Miss. 313, 331, 193 So. 29, 34 (1940).

The court below has inferred a change during a fourteen-year period subsequent to this expression of local law in 1940. That inference is based exclusively on a decision which held that there was no common law negligence liability arising out of a violation of the federal Food, Drug and Cosmetic Act, because as a matter of law, there was no

proximate cause. *E. I. DuPont de Nemours & Co.* v. *Ladner*, 221 Miss. 378, 73 So. (2d) 249 (1954). This opinion adverted to the original American rule and the subsequent rule adopted by other jurisdictions, pertaining to manufacturers' negligence liability to consumers, without commenting on the original rule which had been adopted in Mississippi, although eight Mississippi cases involving operation of the rule were cited with apparent approval. The opinion unequivocally asserted that the particular issue with regard to the manufacturer's duty was whether the locally established exception to the local general rule should be applied to permit recovery, and the Mississippi court stated that it was the applicability of this exception which was urged upon the court. The ground of the court's decision made it unnecessary to decide the applicability of the exception.

The abruptness of the departure from precedent inferred by the court below is more striking in view of a Mississippi holding just two years before, that an employee could recover from his employer's consignor for injuries caused by a negligently loaded shipment of goods to his employer, because the employment status provided the privity relation necessary for recovery, with reliance being placed upon an old English decision. *American Creosote Works* v. *Harp*, 215 Miss. 5, 60 So. (2d) 514 (1952).

Thus, apart from the governing implications of the *Erie* doctrine, even the Mississippi decisions bearing upon manufacturers' liability for negligence, including the two decisions considered and discussed in the opinion of the court below, suggest the necessity for insistence upon an examination of the fabric of local law in order for a federal court to ascertain the strength of a particular thread in that fabric. It is a living law which must be applied in this case, but it is the living law of Mississippi, not that of New York, nor of other jurisdictions, conservative or oth-

erwise, nor of the Restatement. A readiness to overrule earlier holdings cannot be inferred simply from an awareness of change elsewhere or even from a preference for the change. It depends on a judgment of the proper legal manner in which to effect change. The readiness of other courts to overrule their earlier holdings is not relevant and is contrary to the process of change established by the jurisprudence of Mississippi.

The enforcement of local substantive rules in the federal courts must not be subjected to the exigencies dictated by an appraisal of their merits, if the integrity of the *Erie* doctrine is to be maintained. The District Court "reluctantly" enforced Mississippi's "harsh rule," as emphasized in the opinion of the Circuit Court, not because the merits of the rule, also emphasized in the Circuit Court opinion, were unappreciated, but rather because the deeper considerations imposed by the federal judicial system compelled a proper ordering of those merits. It is precisely when the merits of a substantive local rule do not commend it to the federal court that the constancy of the judicial standards for ascertainment becomes urgent. Only then does the problem of this case arise. It is the enforcement of an unpopular rule which demands that appropriate standards be fixed and applied.

In predicting that "the Supreme Court of Mississippi will declare itself in agreement with the more enlightened and generally accepted modern doctrine" the lower court erroneously applied a state common law rule according to standards of a federal common law. It erroneously refused to evaluate Mississippi precedents according to Mississippi law. This error strikes at the heart of the *Erie* doctrine and should not be allowed to stand uncorrected.

Furthermore, this error is compounded by another equally serious one. It is not alone the disregarded local

jurisprudence, and the different result that it compels, which warrants review by this court. Additional direction is needed, beyond the command to include the entire local law among the availiable data utilized in the ascertainment of local law. This case presents for the consideration of this court not only the scope of inquiry required by the *Erie* doctrine for the ascertainment of state law, but also the basic standards required for drawing conclusions from that inquiry. It seems clear that a local precedent cannot be ignored simply because the judicial rule it embodies is generally outmoded elsewhere. It is the local law which must yield indication of a change. *Bernhardt* v. *Polygraphic Co., supra.* Moreover, if that indication is derived from any local judicial expression, then it must be clear and convincing. See *West* v. *A. T. & T. Co., supra,* at 236.

In this case the conclusion of the court below that the local precedent will be overruled is not based upon any local judicial expression criticizing the local rule. Nor is the conclusion based upon any inconsistency or departure discovered in the local law by the extremely limited examination of the court below. This much is clear simply from reading the opinion of the court below. That opinion reveals unmistakably that the court's conclusion is based entirely and exclusively, not on one local dictum critical of the local rule, or commending the contrary rule, but on one local dictum simply referring to the contrary rule, which the court below construes as an apparent approval. Not one local expression on the merits of either rule is offered in that opinion to support the conclusions of the court. Nor can any such expression be found in the local law. Under these circumstances, the court's conclusion is not merely conjectural, unwarranted and without any foundation in the local law, but, more importantly, it clearly conflicts with the standards for the ascertainment of a change in local law, which are inherent in and essen-

tial to the administration of the *Erie* doctrine. See *Bernhardt* v. *Polygraphic Co., supra; West* v. *A. T. & T. Co., supra.*

It is submitted that, since there should be a presumption in favor of the validity of a local precedent, there must be a clear contrary indication expressed in the local law before any federal court may refuse to enforce the local precedent. A suspicion that a local precedent will be overruled is just as objectionable as a complete disregard of the local law when a federal court refuses to enforce a local precedent. The clear and convincing indication contrary to the local precedent must be expressly founded on the local law, with a substantial basis in the local law. Without these standards to guide the ascertainment of local law, its application by the federal courts acquires a discretionary character which makes conformity unnecessarily illusory. Judged by these standards, the error in the preliminary determination of the local law in this case is clear.

Conclusion.

The petitioner submits that, where this important and unsettled question of the appropriate standards essential to the administration of the *Erie* doctrine is presented in this context of the local precedent rejected, contrary to the ignored local jurisprudence, certiorari should be granted.

Respectfully submitted,

AMERICAN EMERY WHEEL WORKS,
By its Attorney,
FRANCIS V. REYNOLDS,

RICHARD P. MCMAHON,
Of Counsel.

Appendix A.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND.

I am frank to say, gentlemen, I have given this matter a lot of thought and I am deeply conscious of the fact that this is an extremely important case from the standpoint of the plaintiff and from the standpoint of the defendant. Perhaps in an abstract sense it is conceivably of more importance to the plaintiff.

As I see it, sitting as a federal court, it is my duty under the doctrine of *Erie v. Tompkins* to follow the state decisional law if there is any decisional law of the courts of last resort of the state where the tort occurred. Clearly under the *Trowbridge* case, this being a situation where the jurisdiction of this Court is based on diversity of citizenship and the existence of a controversy in the required jurisdictional amount, I must first look to see what law applied.

The conflict of law rules of Rhode Island certainly would dictate that the law of Mississippi where the alleged tort occurred shall govern.

Now counsel have cited to me several cases from a court of last resort in the State of Mississippi. This is not a situation where the Court is without clear indication, it seems to the Court, of what the Mississippi law is. I am not called upon to read dicta and try to predict what the court of last resort of Mississippi would do. It seems to me that the position of the Supreme Court of Mississippi is clear. It is unlike the situation presented in the case of *Trowbridge v. Abrasive Co. of Philadelphia*, reported in 190 F.2d 825, where the court says in the absence of any decisions to the contrary it would assume that the doctrine

of the case of *MacPherson v. Buick Motor Co.* was the law of Oregon because of its generally wide acceptance, and the court states in its opinion in that case at Page 828:

> "* * * Hence, in the absence of any decisions to the contrary, we assume it to be the law of Oregon that there is a duty on a manufacturer of a chattel to use reasonable care in manufacturing whenever there is an unreasonable risk that the chattel, if defectively made, will cause substantial harm."

Citing Restatement, Torts, Section 395.

I am frank to say if this were an original question before this Court, I certainly would not follow the doctrine which seems to me to be the law of Mississippi. But I feel, after considerable research of my own and consideration of this problem, that the Supreme Court of Mississippi in the case of *Ford Motor Co. v. Myers*, reported in 117 So. 362, although it was decided in 1928, has clearly indicated that Mississippi is one of those states which refuses to impose liability on a manufacturer for defects and negligence in the manufacture of appliances by it which can be and will become highly dangerous when put to the uses for which they are intended, where there is no contractual privity or privity of contract between the user and the manufacturer.

I think that the rule, as enunciated by the Supreme Court of Mississippi, is a harsh rule and I think it is contrary to the great weight of authority. But as I see the authorities and as I view my position in this matter, it being not an original question for me, I feel that I am bound by the decision of the Supreme Court of Mississippi in *Ford Motor Co. v. Myers*. For that reason I will reluctantly grant the motion to dismiss.

The defendant's motion to dismiss is granted.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5168

WHIT MASON,
Plaintiff, Appellant,

v.

THE AMERICAN EMERY WHEEL WORKS,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND.

Before Magruder, Chief Judge, and Woodbury and Hartigan, Circuit Judges.

OPINION OF THE COURT.

March 8, 1957

Magruder, Chief Judge. Whit Mason, a citizen of Mississippi, filed his complaint in the United States District Court for the District of Rhode Island against The American Emery Wheel Works, a Rhode Island corporation. The case was one in tort for personal injuries alleged to have been suffered by the plaintiff in Mississippi as a result of negligent misfeasance by the defendant in putting out in commerce without adequate care and inspection, a dangerously defective emery wheel. According to the allegations of the complaint, at some time prior to the date of the accident defendant negligently manufactured, inspected and tested a certain emery wheel designed for

attachment to a bench grinder; that due to such negligence the emery wheel was not reasonably fit for the use for which it was intended, but on the contrary subjected to a risk of personal injury all persons lawfully using a bench grinder with the emery wheel attached; that on February 10, 1953, the plaintiff, while in the scope of his employment by T. H. Pearce Company, Forrest County, Mississippi, was operating a bench grinder with an emery wheel attachment manufactured by the defendant; that the said emery wheel, while being so used, did disintegrate and shatter, inflicting serious bodily injury to the plaintiff as a proximate result of defendant's said negligence.

On the face of the complaint it did not specifically appear that plaintiff was not in privity of contract with defendant. The answer of defendant, in addition to denying negligence, and denying that it had manufactured the particular emery wheel which had caused plaintiff's injuries, also set forth as a "First Defense" that the complaint failed to state a claim upon which relief might be granted, and as a "Fourth Defense" that the defendant "owed no duty to the said plaintiff as there is no privity of contract between the plaintiff and the defendant."

The case came up for trial before a jury. Plaintiff's evidence tended to show that a certain emery wheel, supposed to withstand a rotation speed of 3600 r.p.m., was purchased by the Hoover Company, a New Jersey corporation, from the defendant for attachment to a bench grinding machine made by the Hoover Company; that the Hoover Company affixed to the said bench grinding machine, with emery wheel attached, a label indicating that the bench grinder had been manufactured by Miller Falls Company, a Massachusetts corporation; that said bench grinder, having been packed in a crate, and without being removed therefrom, was successively sold by the Hoover Company to Miller Falls Company, by the latter to Komp

Equipment Company, and finally by Komp Equipment Company to T. H. Pearce Company, the plaintiff's employer; that the said grinding machine was unpacked from its original package and affixed to plaintiff's work bench; that while plaintiff was using it in the ordinary and proper manner the emery wheel disintegrated and exploded in plaintiff's face, causing the injuries complained of.

At the conclusion of the plaintiff's case defendant made an oral motion to dismiss the complaint under Rule 41 (b) of the Federal Rules of Civil Procedure. This motion to dismiss was granted by the district court, and an order was entered dismissing the complaint, from which the present appeal was taken.

Since the injury was inflicted in Mississippi, the district court, no doubt correctly under now familiar authorities, deemed itself to be obliged to apply the Mississippi local law to determine the tort liability, if any, of a manufacturer to one not in privity of contract with him. See *Trowbridge v. Abrasive Co. of Philadelphia*, 190 F.2d 825, 827-28 (C.A. 3d 1951). The district court came to the conclusion "reluctantly" that it was bound by the Mississippi law as declared in *Ford Motor Co. v. Myers*, 151 Miss. 73, 117 So. 362 (1928); that the "harsh rule" of Mississippi as so declared, "contrary to the great weight of authority" elsewhere, was that a manufacturer was not liable for negligence in the manufacture of appliances which could and would become highly dangerous when put to the uses for which they are intended, where there is no privity of contract between the user and the manufacturer.

Ford Motor Co. v. Myers, supra, was the only Mississippi case relied upon, or even referred to, by the district court. In that case the Supreme Court of Mississippi, in a half-page opinion, did in fact apply what was at one time the prevailing rule, in holding that Ford Motor Company as the manufacturer of a truck owed no duty of care to a

remote subvendee of the truck who was injured when the truck collapsed and plunged into a ditch because of a defect which could have been detected by reasonable inspection by the manufacturer before the vehicle left the factory.

At a time when the federal courts were applying their own notions of the federal common law of torts, under *Swift v. Tyson*, 41 U.S. 1. (1842), the court in *Huset v. J. I. Case Threshing Machine Co*., 120 Fed. 865, 868 (C. A. 8th, 1903), declared as a general rule that "a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles." At this late date it is hardly necessary to spend much time on the merit or justification for that supposed general rule. As was stated in 49 Harv. L. Rev. 1050 (1936), Sanborn, J., in *Huset v. J. I. Case Threshing Co.*, supra,

> "took as his starting point the supposed general principle that a manufacturer is not liable to third persons, not in privity of contract with him, for bodily injuries resulting from his negligence in manufacturing the article. He was confronted with decided cases imposing liability, in favor of third parties not in privity of contract, upon negligent manufacturers of drugs, foodstuffs, explosives, firearms. These cases he treated as falling within an exception, expressed in a conglomerate formula designed to cover them and no other: '. . . an act of negligence of a manufacturer or vendor which is eminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence.' Cardozo, J., in *MacPherson v. Buick Motor Co.*, (217 N. Y. 382, 111 N. E. 1050 (1916) convincingly argued that these

> so-called exceptions were merely prime illustrations, and by no means the only ones, of the more basic principle of torts that actors generally, including manufacturers, have a duty of care not to create unreasonable risks of bodily injury to others within the zone of foreseeable danger."

MacPherson v. *Buick Motor Co.*, supra, started a new trend in this particular field of the law, and its substantive result has found favor in § 395 of the American Law Institute Restatement of Torts. If the Supreme Court of Mississippi had recently reconsidered the rule it applied in *Ford Motor Co. v. Myers*, supra, and had decided to adhere to it on the ground of stare decisis, no doubt the federal courts would have had to accept the local law as so declared. But it would be gratuitous and unwarranted to assume that the Supreme Court of Mississippi would now so hold, when we bear in mind the readiness of other courts, in conservative jurisdictions at that, to overrule their earlier holdings and to bring their jurisprudence into accord with what is now the overwhelming weight of authority. See, for instance, *Carter v. Yardley & Co. Ltd.*, 319 Mass. 92, 64 N.E. 2d 693 (1946). In *Anderson v. Linton*, 178 F.2d 304 (C.A. 7th, 1949), the court of appeals declined to accept as the local law of Iowa what it narrowly construed to be a dictum of the Supreme Court of Iowa enunciating the old ruling of nonliability in *Larrabee v. Des Moines Tent & Awning Co.* 189 Iowa 319, 178 N.W. 373 (1920). The Court of Appeals for the Seventh Circuit stated (178 F.2d at 308-09):

> "That case was decided in 1920, which was before the general abandonment of the old rule of non-liability where neither direct nor indirect privity existed. It is barely possible that had the court passed upon the question now before us, it might have upheld the old

rule, even though weighted down with many exceptions. However, as there are no controlling Iowa decisions on the precise question before us for decision, we feel that we should not attribute to Iowa a doctrine that has been repudiated by most jurisdictions; we feel justified in concluding that the Supreme Court of Iowa would today adopt the modern rule, which is well expressed in Restatement of the Law of Torts, Sec. 395: 'A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured.'"

See also *General Motors Corp. v. Johnson*, 137 F.2d 320 (C. A. 4th 1943); *International Derrick & Equipment Co. v. Croix*, F.2d (C. A. 5th, Feb. 13, 1957).

Of course it is not necessary that a case be explicitly overruled in order to lose its persuasive force as an indication of what the law is. A decision may become so overloaded with illogical exceptions that by erosion of time it may lose its persuasive or binding force even in the inferior courts of the same jurisdiction. And where, as in *Ford Motor Co. v. Myers*, the Supreme Court of Mississippi, twenty or thirty years ago, applied an old rule which has since been generally discredited elsewhere, it is relevant to consider what the Supreme Court of Mississippi has subsequently said on the point. See "Note on the Ways of Ascertaining State Law," Hart & Wechsler, The Federal Courts and the Federal System 628-30 (1953). We think that appellant herein rightly stresses the importance

of *E. I. DuPont deNemours & Co. v. Ladner*, 221 Miss. 378, 73 So.2d 249 (1954). In that very recent case, the Supreme Court of Mississippi was able to dispose of the particular issue on another ground without the necessity of expressly overruling its earlier decision in *Ford Motor Co. v. Myers*. But the court did take occasion, in a long and careful opinion, to indicate its awareness of the modern trend in the area, including the decision of the Supreme Judicial Court of Massachusetts in *Carter v. Yardley & Co. Ltd.*, supra; it stated that, whatever may have been the rule originally, "the principle seems now to be well established by the decisions of many courts that a person who has had no direct contractual relations with a manufacturer may nevertheless recover from such manufacturer for damages to property caused by the negligence of the manufacturer in the same manner that such a remote vendee or other third person can recover for personal injuries." (73 So.2d at 254). And it quoted, with apparent approval, many more recent authorities in support of the "modern doctrine." (Ibid) We think it is fair to infer from this latest expression by the Supreme Court of Mississippi that it is prepared to reconsider and revise the rule it applied in *Ford Motor Co. v. Myers* whenever it may have before it a case that squarely presents the issue. We have no doubt that when this occasion does come to pass, the Supreme Court of Mississippi will declare itself in agreement with the more enlightened and generally accepted modern doctrine.

A judgment will be entered vacating the order of the District Court, dismissing the complaint and remanding the case to the District Court for further proceedings not inconsistent with this opinion.

Hartigan, Circuit Judge (concurring). I concur in the opinion of the court but I am constrained to comment briefly. We were informed in oral argument by counsel for

the appellee that the district court in deciding this case had before it both the *Ford* and the *DuPont* decisions. Moreover, the district court knew from the official Mississippi report that the *MacPherson* case, then approximately twelve years old, had been considered and rejected by the Mississippi Supreme Court sitting in the *Ford* case. Therefore, "reluctantly" Judge Day adopted the *Ford* holding since it, as the only binding and conclusive statement of Mississippi law on the issue, had not been expressly modified or overruled. Certainly the existence of the *Ford* case presented to the trial judge a question different from that in the *Larrabee* case, cited in the opinion of the court today, where there was no controlling Iowa decision on the precise question in issue.

We, however, have inferred from pure dicta in the *DuPont* case and from the status of the law elsewhere on this issue that Mississippi is prepared to discard the *Ford* rule and adopt the modern rule. I believe this is a sound inference since the dicta in the *DuPont* case, though not expressly mentioning *Ford*, is sufficiently clear and the *Ford* rule is sufficiently outdated. Yet, in doing so I realize that we present a difficult problem for district judges when they must apply the *Erie* doctrine to situations wherein the considerations as between conflicting holdings and dicta are not as clearly defined as they are here. The question of how clear dicta must be to prevail over a prior controlling decision does not lend itself to easy solution.